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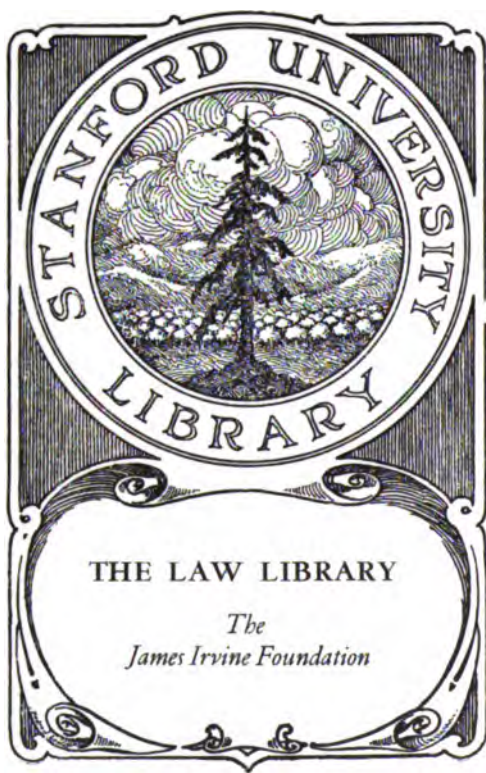
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**IN**  
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**BY**  
**JOHN DOVE WILSON,**  
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*THIRD EDITION.*

**EDINBURGH:**  
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## PREFACE TO THE THIRD EDITION.

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**T**HERE can be no question of the importance of that branch of the law which treats of the manner in which rights are enforced. To the public it is, perhaps, the most important branch of all, because unless its provisions are so arranged as to admit of disputes being settled with expedition, economy, and certainty, the provisions of the other branches of the law may remain to a great extent inoperative. Unfortunately it is the branch which has, perhaps, the fewest attractions for the jurist, and in Scotland it was till recently comparatively neglected. It has consequently suffered both in substance and in form. In substance the deficiencies are, perhaps, not so marked; but the form is about as inconvenient as can well be imagined. The law of process, which in any well-considered system ought to be embodied in a code, has to be searched for in this country among innumerable decisions, through many statutes, and many orders of court, hardly one of which is complete in itself, and which, taken altogether, extend over such a period of time and fill such a mass of literature, as to make the extrication of the practical rules a task of serious difficulty.

It was with the view of reducing the various rules to such a form as might, as far as was practicable, give some of the benefits which would be given by a code, that I originally undertook this work. The First Edition was published in

1869, and what I had attempted, was apparently appreciated by the profession, as the Edition was not long in being exhausted. In 1875, a Second Edition was published, and as it has now been about two years out of print, I have prepared this, the Third, Edition. In the successive Editions, the work has grown somewhat in size; but that has not been due to any change in the original plan. When it would have been much easier for me, many a time, to have been diffuse, I have given myself much trouble to present the rules in the clearest and most concise form in which I could, keeping always in view that the first purpose of the book is that it shall be, like a code, a convenient practical guide, giving what is wanted and nothing more. The increase in size is mainly due to new legislation, and it has been caused partly by what the Legislature has done, and partly by the way in which it has done it. Since the First Edition was published, the Legislature has made large additions to the jurisdiction of the Sheriff Courts, and large alterations on its practice; and in making these changes the Legislature has always proceeded by way of adding to or amending the old materials. Thus, though it has added much new legislation, it has repealed almost none of the old; and it has therefore often been necessary for me, not merely to explain the new portions, but to show how the old have been affected by them.

The plan of the treatise is, *firstly*, to explain the constitution and jurisdiction of the Sheriff Courts; *secondly*, to trace the ordinary action for the payment of money from beginning to end, giving (in separate chapters) the normal proceedings which occur in almost every action, the occasional proceedings required in exceptional circumstances, the right of appeal within the Court, and the mode of enforcing the judgment; *thirdly*, to take the various forms of special action (with the

exception of those relating to succession, which are reserved for separate treatment), and to show wherein each special action differs from the ordinary; *fourthly*, to point out wherein the summary forms of procedure authorised by the Small-Debt Act of 1837, and the Debts-Recovery Act of 1867, differ from the ordinary action; *fifthly*, to explain the duties which the Sheriff may be called upon to perform when property passes by succession; and *sixthly*, to give an account of the modes of appealing in civil causes from the Sheriff to higher Courts. Throughout the body of the treatise I have carefully avoided historical digressions, giving no more of history in it than was at times unavoidable in order to explain some proceeding which otherwise might have appeared anomalous; and reserving for an introductory chapter, written for the benefit of the student, an explanation of everything known to me of the history of the Sheriff Courts which appeared to me likely to be of interest or value.

The present Edition differs materially from both of its predecessors. In consequence of the passing of the Sheriff-Courts Act of 1876, it was necessary for me to re-write a large part of the treatise,—nearly the whole of the part relating to the normal proceedings in the ordinary action being new. Considerable additions to the rest of the treatise have been required by the additions to the jurisdiction made by the Sheriff-Courts Act of 1877, the Judicial Factors Act of 1880, the Entail Act of 1882, and other Acts. Further additions have been required in consequence of the addition of new procedure by such Acts as the Citation Amendment Act, the Judgments Extension Act, and the Civil Imprisonment Act, all of 1882, as well as by some others which it is needless to specify. In this way probably not less than a third of the present Edition consists of new matter. As a small curtailment, on the other

hand, I have omitted from this Edition any notice of the process of *Cessio Bonorum*. That process having recently undergone a complete alteration, it became necessary for me either to omit it altogether, or to include in the treatise a large part of the law of bankruptcy. As the law of bankruptcy has no connection with the law of process, I decided upon omitting the subject, and leaving it to the writers on bankruptcy, to whose province it now properly belongs. It is, perhaps, right to add that for similar reasons some other subjects have always been omitted. Thus, proceedings in valuation trials, in the registration of voters and election of members of parliament, and those under the Public Health Act, have all been omitted, because they were little germane to the rest of the contents, and because they are all discussed in excellent special treatises.

For upwards of twenty-one years, in what now forms the sheriffdom of Aberdeen, Kincardine, and Banff, I have performed those duties of a Sheriff which fall to be performed by the resident representative of the office, and for thirteen of these years have discharged my duties in the commercial city of Aberdeen. I have thus necessarily seen a very great extent and variety of practice, and I believe there is no kind of civil proceeding competent in the Sheriff Court, from a small-debt action involving a small sum and lasting a short time, to a valuation jury-trial involving several thousand pounds and lasting several days, in which I have not been concerned as judge. To this experience I have added a study—which has, at least, not been superficial—of everything necessary to render it intelligent. That I shall have escaped what others may deem to be errors is out of the question, considering the large and confused mass of materials out of which something like order has to be evolved; but I have told my readers every-



thing which I have learned, and if there is anything which strikes any of them as either erroneous or defective, I shall always be grateful for its being pointed out. It is only in this way that comparative accuracy can be obtained, and I have to thank those who in past times have made communications to me. Although there is little probability that I shall personally edit another Edition, I shall take care that any suggestions for the improvement of the book shall receive due attention, and if in the course of time another Edition is required, it shall be forthcoming under the charge of some competent editor.

In preparing this Edition I have had some valuable assistance which deserves special acknowledgment. Mr. J. D. Sym, Advocate, has carefully verified all the references, and has performed (I am sure) satisfactorily the difficult duty of revising and adapting the Index. I am also much indebted to him for many very useful suggestions on other points. My special thanks are due also to Mr. William Murison, Sheriff-Clerk Depute, Aberdeen, who has given me the benefit throughout the treatise of the thorough knowledge which he possesses of Sheriff Court process, and in particular of everything which is required in the department of the Sheriff-Clerk.

J. DOVE WILSON.

SHERIFFS' CHAMBERS,  
ABERDEEN, *9th August*, 1883.



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THE PRACTICE  
OF THE  
SHERIFF COURTS OF SCOTLAND  
IN  
CIVIL CAUSES.

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HISTORICAL INTRODUCTION.

[IN the body of this Treatise I have described the existing constitution of the Sheriff Courts, endeavouring to answer the two questions—What it is they profess to do? and How it is that it is done? The necessity which I am under—for practical purposes—of answering those two questions in the treatise with as much brevity and clearness as may be possible, has prevented me from there entering on historical matters further than is occasionally requisite in order to make the statement intelligible. But the historical part of the subject is by far the most interesting, and while investigating the present condition of the Courts, there grew under my hands a quantity of materials useful only for illustrating the past. These I from time to time supplemented by further investigations; and in this Historical Introduction I propose to answer, as best I can, the question, How it is that the Sheriff Courts have come to be here? The reply

will have an interest for students of law, and possibly for some of its practitioners. I hope that it may also have a wider interest. As a chapter in the history of civilisation, describing the progress of an important institution from the rudest beginnings to a comparatively high development, it may interest many to whom purely legal discussions would be merely an affliction.

The Scotch Sheriff Courts are not, as the English County Courts are, things of yesterday, regulated by complete statutory codes,<sup>(a)</sup> with all their parts forming a fairly harmonious whole, but are ancient institutions, and though still full of vigorous life, full also of all manner of anomalies. Though local courts, their jurisdiction in some respects rivals that of the highest courts. At other times the jurisdiction falls short at strangely absurd limits. The Sheriff Courts may, for example, settle the right to any amount of money, and yet cannot (except with the consent of both parties) decide as to the property of a square yard of land. In applying deeds, they may settle questions of law involving any extent of pecuniary liability, and yet be stopped, at the pleasure of an obstinate litigant, by inability to determine simple questions of fact involving, perhaps, only a few pounds. Not less startling are the anomalies in their modes of proceeding. Matters involving the merest trifles will be found to be regulated with the utmost precision, and matters of the highest importance left with the loosest vagueness. The time, for example, at which some pleading may require to be lodged will be found to have been an object of most anxious solicitude to the Legislature, while on points even affecting the liberty of the subject it will be found that no old popular

(a) The "Rules, orders, and forms" for the English County Courts, as revised in 1875, are almost a code.

court that ever met on its moot hill was freer from written law. And if what the Sheriff Courts may do, and how they may do it, are subject to such anomalies, not less strange are the relations in which they stand to the higher courts under whose control they work. A man may discover that he has been fined by the Sheriff a hundred pounds, or has been sentenced to pass a year or two of his life in prison, and that he has no appeal; while another, who perhaps complains that he has been wrongously deprived of a half-crown snuff-box, may find that he possesses the ruinous privilege of appealing, even till he reaches the House of Lords.

It is almost self-evident that the system could never have had a deliberate constructor. Time was when men were satisfied to assume that at some distant period a great legislator had deliberately planned and laid out an institution, and that the anomalies were the growth of subsequent times. Every country almost has its great prehistoric legislator, and as Greece has its Solon and Lycurgus, so Scotland during the centuries of the Middle Ages revered its Malcolm and David, to whom the framing of the good old laws was attributed. Perhaps to them was never consciously attributed the creation of the Sheriff Courts, because our ancestors seem little to have troubled themselves about the origin of our institutions. But for long in England it was received as an adequate explanation of the origin of the county system, that Alfred the Great had divided out the country into shires, and provided each with its appropriate staff of officers.<sup>(b)</sup> Plainly no such heroic solution of the question will suffice. As assumptions are discarded, and facts are investigated, no trace of a deliberate origin for such institutions is to be found. To use language familiar in other departments of science, such things as our

(b) See Spelman's Glossary, p. 141.

local courts are due to a process of evolution, whereby from old, and often widely different institutions, the present have been gradually developed.

In tracing this process of evolution, it will necessarily be only the leading currents that can be followed, and the leading features that can be noticed. A merely chronological narrative of the changes that have befallen the Sheriff Courts would have no value and no interest; it is only by connecting the changes together by the ideas that have been at their root that they can have either the one or the other; and it is better to run the risk, unavoidable perhaps in the first attempt, of classifying the facts to some extent erroneously, than to leave the attempt unmade.

The territorial divisions to which our Sheriff Courts are attached are far older than the Courts themselves. The origin of these divisions is very obscure. But if there is anything clear about the division of the country into counties it is that it was not made purposely. There is no such thing known in history as a division of Scotland into districts for judicial or administrative purposes. And a glance at a map will show at once that there never could have been such a thing. The enormous variation in size, the inconvenience and irregularity of shape—so great that fragments of counties are sometimes scattered in different parts of the country—show that the counties were never laid out as administrative districts. They must have had their origin in some natural circumstances; and as to what that origin was we have no difficulty in making at least a plausible surmise. In point of time their origin is prehistoric. There seems little doubt but that the germs of the present counties existed long before Scotland had any right to be considered as a consolidated nation. Individual modifications there have been within the historic times;—counties

have been subdivided, others thrown together, and parts have been taken from one and added to another, but even these modifications have been comparatively few. The first complete list of the Scottish counties known to me—that made about six centuries ago for Edward the First—scarcely differs from the present division.(c) It is the same with England, where the counties, as given by William of Malmesbury, do not differ materially from what they are now.(d) The germ of the system therefore goes back beyond the historic period to the time when the country was still divided among a set of semi-independent tribes. It is of course impossible to trace all the counties back to this stage, but in the case of many of them, among which Fife, Forfar, Kincardine, and Moray may be instanced, there is sufficiently good evidence that the county existed long previous to its incorporation in the kingdom as an almost independent earldom or maor-mordom, or by whatever other name antiquaries may think best to call it.(e) What is known about these instances may readily be believed to have happened in others. On this theory all the irregularities of size and shape are easily explained. The county consisted of just as much land as the tribe, or colony it may be, which first settled on it could conquer and hold together.

These tribal settlements must have contained within themselves from the earliest times some means of administering justice. What those were in Scotland the knowledge we have of our country does not enable us to say, but, by putting together what is known here and what is known in other countries of the institutions of the races

(c) Printed in vol. i. of the folio edition of the Scots Acts.

(d) See Palgrave's *English Commonwealth*, part i. pp. 116, 117.

(e) Mr. E. W. Robertson's *Early Scottish History* exhibits at full length, and with much learning, what is to be said on this subject.

which settled here, we obtain a view of what ours must have been.(f)

At the opening of the historic period in Scotland four leading races are found in possession. To the south of the Forth the Saxons have possession of the eastern half, and the British of the western; while to the north of the Forth the Celts have possession of all not conquered by the Norsemen. It will be seen that I have discarded the Picts, and I have done so on the ground that, although they may have formed a separate race, their institutions have so completely disappeared that they may be left out of consideration. The four leading races—not one of which probably was unmixed—all closely resembled each other. The four fall readily into two groups, the Teutonic and Celtic; and it is customary to assume that there were great and fundamental differences at least between those two races. I do not think the facts bear this out. We have been misled, I think, by two things. All barbarous (and most civilised) nations are in the habit of greatly exaggerating the differences between themselves; and we are, moreover, too apt to assume that the difference in the name of an official or institution implies some essential difference in function, whereas the difference may have originated in the merest trifle. We find very considerable diversity of name among the officials in Teutonic and Celtic antiquities, but, so far as we can gather, very little difference in duty, and the explanation I suggest is, that the nominal differences were due to accidental circumstances, to which we have now lost the clue. How little, difference of name necessarily implies difference

(f) The leading authorities will be found in Schmidt, *Gesetze der Angelsachsen*; Gneist, *Geschichte der Englischen Communal-verfassung*; E.

W. Robertson's *Historical Essays* (1872, article "Shire"); and Palgrave's *English Commonwealth*, already referred to.

of function may be seen from one modern instance. Duke, Marquis, Earl, Viscount, and Baron, are all usually supposed by us to mark differences worthy of being kept in mind; but if the antiquary of the future should direct his attention to the matter, he would find that the essential difference lay, not in power, influence, wealth, or intellect, but, would discover, possibly after much labour, that it lay in the right to walk in a certain rank in processions that were never held, and in the right to certain distinctive robes that were never worn.

In all the four races the tribal constitution seems to have been almost identical, and all recognised the distinction between executive and judicial functions. In the Saxon country two lay officials were supreme—the Earl and the Sheriff. Among the Celts—Chief and Brehon filled analogous offices. Among the Norse and the British a similar division reigned. How the division of duty first arose it is hardly possible to explain, nor do we know with certainty how the appointments to the respective offices were made. It is common to believe that representative institutions existed at some early period among the Saxons while still in their German home, and that these representative institutions were afterwards superseded by hereditary.<sup>(g)</sup> It seems to me, with all deference to high authorities, that the evidence on which this is believed is insufficient. The Roman writers, Cæsar and Tacitus, on whose statements it is mainly founded, could easily have been misled by their preconceived ideas, and by the difficulty they were under of getting accurate information.<sup>(h)</sup> It would be against everything that is known of other rude

(g) See Freeman's *Growth of the English Constitution* for a statement of this view.

(h) The reader will find the passages

referred to, as well as many others bearing on the subject, in Professor Stubb's *Illustrations of English Constitutional History*.

tribes to suppose that the early Saxons had representative institutions, and to suppose that they relapsed to hereditary as they grew more civilised. Certainly, at the dawn of the historic period the Earl was hereditary. The Chief and the Brehon were, so far as we can ascertain, also hereditary.<sup>(i)</sup> From these I infer that the Sheriff must also have been a hereditary official; and unless he had all along been so, I do not see how his office could have been so quietly accepted in that form for centuries of the historic period. That the office was ever elective there is no evidence. The only doubt is whether the Sheriff may not have been nominated by the Earl; but this, seeing that he claimed almost equal authority, and that he was the principal check on the Earl's abuse of power, I think improbable. In speaking of these offices as hereditary, it must not be understood that I use the word in the strict sense with which we are familiar. Till an office degenerates from a power to a mere dignity, it can never be strictly hereditary. At most, the right to it lies in a particular family, the members of which and the governed class settle between them, in all sorts of irregular ways, the particular holder of the office.<sup>(j)</sup>

Having thus traced the offices back to the hereditary stage, we are still a long way from knowing their origin. How the offices—either that of ruler or that of judge—came to be hereditary it is very difficult to explain. The race of hereditary judges is almost extinct in the more civilised parts of the

(i) To go no further than the *Senchus Mor*, many parts of it abundantly make this out. This treasury of Celtic law and custom has (with the needful translation) been published by the Irish Record Commission. Mr. W. F. Skene's learned work on Celtic Scotland, contains a great deal of interesting infor-

mation on these matters.

(j) The reader who is interested in the general question whether hereditary or representative institutions are the older will find it discussed by me in an article on "The Origin of Government" in the *Contemporary Review* for September, 1882.



world, while hereditary rulers still flourish in abundance, but the origin in either case is lost in the obscurity of the pre-historic period. Palgrave's most ingenious suggestion, that the Earl represented the freeman, and the Sheriff the churl, among the Saxons, affords a possible clue. The free and the unfree were probably the descendants respectively of a conquering and a conquered race, and the hereditary judges may have been the descendants of the chiefs of the latter, retaining the right to advise after the power to order had expired. Another view, much less probable, however, would explain the existence of these hereditary judges on the ground of inherited fitness for the office, just in the same way as other hereditary professions and trades are sometimes said to have arisen. To support this view there is the fact that the earliest laws were undoubtedly metrical, and were handed on from father to son; and it is thus possible that not only the possession of the materials, but the power to apply them, might come to be inherited.(k)

The tribal judges were hardly judges in our sense of the word. They were more of the nature of assessors, and sometimes of presidents of the Court. The Court must have been composed of all the free men of the tribe; its president usually was the Earl or Chief. It was only in the absence of the Earl that the Sheriff presided. It is this which explains (what is now admitted to be) the misunderstanding embodied in the Middle-Age Latin translations of the names, which made the Earl and Sheriff respectively Comes and Vice-comes. The position of the Brehon as a mere adviser is very plain in the remains of the Celtic laws which we have.(l) So

(k) The earlier parts of the *Senchus Mor* are in rhyme. See also Palgrave, pt. ii. p. cxxxiii.

(l) *Senchus Mor*, vol. i. pp. 19, 55, 203, &c.

thoroughly was the Sheriff—whatever seat he may have occupied in the Court—a mere adviser, that even in comparatively late historic times he was obliged to leave it while the members deliberated.(*m*) The free men, or, as they were afterwards called, freeholders, decided everything—both fact and law—and were the direct ancestors, in Scotland at least, of the present jurors. Until long within the historic period in Scotland, the Sheriff's Court had the character of a popular assembly; all the freeholders were bound to attend it, all who attended formed the jury, and this jury decided all questions, civil and criminal, of law and of fact. It was apparently through the disuse of the freeholders to attend that the Sheriff came to be in most cases the sole judge.(*n*)

Nothing approaching to an uninterrupted continuity can be traced between the old tribal courts and the modern Sheriff Courts. Whether in prehistoric times there ever were in Saxon Scotland, Sheriffs with the same powers as they had in other Saxon settlements is not clear. It is very possible that on this, their farthest colony, with its inhabitants much mixed with older races, Saxon institutions did not flourish in their full strength. If they did they must have decayed; and so apparently had the tribal courts in the other parts of the country. Long before the counties became integral parts of the kingdom, the bond which had kept the county together, and had made it capable of acting as one whole, had become weakened. In the earlier charters and collections of law, at the opening of the historic period in Scotland, the county

(*m*) Assise of King David; Scots Acts (fol.) vol. i. p. 5.

(*n*) The Sheriff Court Records of Aberdeen from 1503 to 1508 are extant, and through the kindness of the late Mr. Grant Leslie I had access to

an abstract of them which he prepared. The juries are of all numbers, eleven, fifteen, sixteen, and eighteen, for example. The absent are fined. The causes are both civil and criminal.

judge is a mere shadow ; and it is the courts of the Burghs and of the Barons which we find as the active administrators of justice. The communities into which the county was subdivided had grown far too strong and too independent, and the power of the Earl and the Earl's Court, or that of the maarmor, seems (beyond his own barony) to have existed as a mere tradition. Practically, at the opening of the historic period, say in the year 1000, and for more than a century after that date, there was no Sheriff or other county judge in Scotland. That fact the charters and documents of the eleventh century show pretty distinctly.<sup>(o)</sup> What we have to explain, therefore, is how the Sheriff's office was here introduced or revived, and by what influences it was fostered, till it came to be in civil matters the sole county authority in every district.

It is at the opening of the historic period that a new influence comes to bear. When, after the Norman Conquest, England became consolidated under one government, it became a question whether the Scotch tribes were to fall under it, or were, by uniting, to preserve for some centuries more their independence. That question was fought out. One of the families of the ancient earls became, after endless conflicts with the others, strong enough to enforce its claim to the Crown, and to assert its right to lead the nation. It took more than three centuries before this was accomplished, before the consolidation of Scotland was even in appearance effected and the question of independence settled. To our powerful rival we owed the necessity of uniting, and to the same necessity that of preserving our union. The royal authority

(o) King David's Charters, so far as I have seen, hardly mention Sheriffs. Mention of them seems to become frequent first in the time of William

the Lion (1165-1214). They are mentioned in the "Assize of David," but only the germ of this compilation can have come from David's time.

became the symbol of union, and in our country there came to work itself out that same problem of centralisation which was seething in the Middle Ages in every country in Europe.

The power of the Crown was used, as every one knows, to destroy that of the earls and barons, and to reduce their position to that of powerless dignitaries. The history of how that was done belongs to the region of politics. The only result of it which concerns us was the revival, under a new theory, of the County Court. The ancient office of Sheriff became of great importance. In a mixed nation the institutions of one of the races must in the end predominate, and with us the Teutonic obtained the lead. If it was right to learn from the enemy, we made no scruple about learning from England. Our Court and our wealthy classes were thoroughly imbued with Norman or Saxon ideas.<sup>(p)</sup> We copied their institutions wholesale. Our burgh laws, our cathedral charters, nay, what bore to be the very codes of our national laws, we copied verbatim from English sources. Among other institutions we copied that of Sheriff. At the period of its highest importance the English office of Sheriff was exactly the thing for our kings. The office was at its highest in England at the end of the Saxon period. The Sheriff had then lost the character of a local official, and was known as the King's Sheriff. Probably this had resulted from his having been played off against the earl, as being the king's representative within the earldom or county. In Scotland a representative of the King's authority in each district was what was wanted, and the example of England, harmonising as it did with the old traditions of Scotland, made the Sheriff exactly the official to be

(p) Mr. E. W. Robertson attributes the Norman influx to the time of David, and — apparently on good grounds,—maintains that the digni-  
taries of Alexander's Court were Gaelic.—*Early Scottish History*, vol. i. p. 184.

introduced. It thus happened that an office, which in its original country was virtually extinguished in the process of centralisation, was taken up and fostered in our country. In England the power of the Sheriffs fell before that of the King's Justices who went their circuits. In Scotland we were a long way from the time when the Circuit Courts could exert much real power, and the office of Sheriff afforded the readiest means of propagating the royal authority.

The change was made easy by the feudal theory that all power flowed from the king, and that the proper evidence of it was a royal charter.<sup>(q)</sup> Thus earl and thane, maormor and toshach, were persuaded, whenever it was possible, to accept grants of sheriffdom, and give up their independence in return for royal patronage. The local dignitary was thus turned, sometimes doubtless sore against his will, into a representative of the central power; and then began a long series of changes by which his local rivals were extinguished, and at the same time his own subjection completed.

The Sheriffs being thus established, the changes by which their courts came at last to be the only local courts having jurisdiction of any extent were not carried out except through a long interval of time. Their courts had three formidable rivals. In the counties they for long shared the power with the Courts of the Regalities. In the burghs they were (till quite recently) eclipsed by the Burgh Courts. In both town and county they had to yield in certain important matters to the Bishop's Diocesan Courts.

The Courts of the Regalities were the direct descendants of the ancient courts of the baronies or communities into which the counties were subdivided before the dawn of the

(q) The theory of the King's supremacy is set out in the laws attributed to "Malcolm Makkenneth," printed in vol. I. of Scots Acts (fol.)

historic period. Their jurisdiction, dating of course from the times when central courts did not exist, was, as the name implies, regal, including everything which could fall under the cognisance of a court in early times. Even the four pleas of the Crown were dealt with by the courts of the regalties.<sup>(r)</sup> The parts of the county which were not regalties were called the royalty. How the germ of the royalty arose it is not difficult to guess. The Sheriff was always one of the barons, and doubtless at first the royalty was nothing but his own hereditary barony and the Crown lands, which were often extensive. But every means was taken to add to it at the expense of the regality. Whenever the jurisdiction of any barony was forfeited or fell into disuse, the territory accresced to the royalty, and fell under the Sheriff, whose jurisdiction in feudal theory was held to extend over the whole county.<sup>(s)</sup> Various acts prohibited the king from regranteeing lapsed regalties.<sup>(t)</sup> Thus, gradually the royalty was increased at the expense of the regalties; but from the thirteenth to the eighteenth centuries the division of the Scotch counties into royalty and regality was of the most important character.

The relations between the Sheriffs and the Lords of the Regalties were of the most curious kind. In theory the Sheriffs had the higher place, but in fact the judges of the regality had more power and jurisdiction. The theories of the courtly lawyers, that the royal Sheriff was the highest local judge, were mere theories. Equally fruitless were some of the attempts of the early legislatures to insist that the King's Sheriff should always be present (something in the character of assessor) in the baron's court to see that justice

(r) Erskine's Institute, I. iv. 8.

(s) 1449, c. 26.

(t) 1445, c. 43, may be taken as an example.

was done.(u) The acts seem to have remained dead letters, and the barons exercised justice without supervision. The legislature was, in fact, compelled to treat the Sheriffs and the barons as judges of co-ordinate jurisdiction, and there are many statutes which require each to respect the letters of the other, to aid the other in capturing fugitives and in doing justice on offenders.(v) If the Sheriff attempted to do justice on a man subject to a regality, he was promptly checked by the power to "repledge." Under this the Barons' Baillie appeared at the Sheriff's Court, claimed the accused, undertook that he should be tried within a certain time, and carried him off to his own Lord.(w) The rise of this system of repledging showed that the powers of the Lords were on the wane, but when the regalities were at last extinguished they were far from being empty dignities, and still, over nearly all Scotland, exercised an extensive jurisdiction.

It was the necessity for settling the country after the Rebellions of 1715 and 1745 which gave Government strength to extinguish the regality. Along with other less important local jurisdictions, the regalities fell at the passing of the Heritable Jurisdictions Act of 1748. Naturally they were not surrendered without a struggle. They were claimed as rights of property, to which, indeed, they had a close resemblance.(x) In 1745 one was actually held by a woman. The "practical working" of the system was pronounced to be the best possible. Nothing, it was agreed, could exceed the care with which the

(u) Provisions to this effect will be found in the *Assize of William* (circa 1180), printed in vol. i. of *folio Scots Acts*, also in an Act of about 1230, attributed to Alexander II.

(v) Laws of this kind are found from the time of Robert III. (1397), and earlier, down to 1663 (c. 15), and even later.

(w) The proceedings are recorded in the Sheriff Court books of Aberdeen, of the Baillie of the Regality of Tarves, on 10th January, 1558, repledging a man accused of a spulzie.

(x) In the Act for the Union 1707, c. 8, they were treated as rights of property.

barons sought out excellent lawyers and honourable men to sit in their Courts; except perhaps the promptitude and economy with which the Court of Session set them right, if at any time such exemplary courts should err. Some of the arguments used in defence of the hereditary territorial judges were a parody of those used in defence of hereditary legislators at the present day.(y) All, however, was unavailing. Their time was come. Their owners were paid a little money; and the last genuine active relic of feudalism was abolished. Henceforth, in the county, the Sheriff was, in practice as well as theory, the Judge Ordinary.(z)

Curiously it was not till much later that the Sheriff's authority within the burghs came to be fully recognised. It is long since the power of the Burgh Courts fell into disuse in the smaller burghs, but in the larger burghs it endured till the present century. In civil matters the Sheriff and the Burgh Courts were courts of concurrent jurisdiction. Unquestionably, in very early times, the Burgh Courts were the sole courts within burghs,(a) but gradually the Sheriff's claim to an equal jurisdiction came to be ceded, and now the Sheriff is almost the sole judge. The burghs, like the barons, were beguiled into accepting charters, and then the Law Courts took the charters as the measures of their rights. If the burgh magistrates were not made Sheriffs by the charter, the King's Sheriffs had the jurisdiction; if the magistrates had a grant of Sheriffdom, the King's Sheriffs (unless expressly excluded) were held to have concurrent jurisdiction.(b) But as the local institutions were better developed and of a more popular character within burghs, they resisted longer than in the

(y) See the Scots Magazine, vol. ix., p. 132 (1747); *ib.* 501.

(z) 20 Geo. II. c. 43. The heritable jurisdictions of those who were out in

1715 were forfeited by 1 Geo. I. c. 50.

(a) The laws of the four Burghs make no mention of the Sheriff.

(b) Erskine i. iv. 21.



counties. At the beginning of this century it is well-known that the Burgh Courts were very active, and that with the aid of assessors, some of whom were lawyers of high repute, they decided pecuniary civil claims of large amounts. Naturally, however, a concurrent jurisdiction is a state of things which will not last. One or other of the competing Courts, in course of time, acquires the greater confidence, and concentrates attention. It was so with the Sheriff Courts, and a series of almost accidental oversights completed within a short time what otherwise would have been more gradual. In many of the recent legislative measures improvements have been made in the Sheriff Courts, while the Burgh Courts were forgotten, and thus the latter, suffering under a comparatively antiquated system of procedure, have become inert.(c) In criminal matters something of the same kind has happened, but in some of the earlier steps in criminal proceedings, and in the punishment of the smaller crimes, the Burgh Magistrates still continue to exercise in some places their old authority.

The Diocesan Courts of the Bishops were exercised through their Commissaries, and had at one time possessed an extensive, though ill-defined, jurisdiction. These courts were hardly at first rivals of the Sheriffs. They came later into the field, and struck out for themselves a new line. Births, marriages, and deaths have always been occasions for the intervention of the clergy; and of old the clergy did not keep within their own functions, but transacted largely the attendant civil business. The practice of fortifying contracts by an oath, and of then treating them as falling within the ecclesiastical

(c) The Burgh Courts seem to have not to have been touched since. The Acts of 1838, 1853, and 1876, do been last regulated by Act of Sederunt in 1825, and (except as to proofs, in 1849) not apply to the Burgh Courts.

domain, opened the doors of the Church Courts to an indefinite amount of civil business.(d) Thus the Commissary Courts possessed a widish sphere; and as they had attached to themselves—first of all local courts—respectable bodies of practitioners, their sphere had every tendency to increase. The Bishops, as powers of the State, came to an end in 1689, and one would have thought that in a Presbyterian country their courts would soon have followed, but their courts existed in full vigour to the beginning of the present century, when at last their jurisdiction was transferred, partly to the Court of Session and partly to the Sheriff Courts.(e) Even so late as 1876,(f) the transference of jurisdiction was in form incomplete. In certain actions the Sheriff till then assumed the style and title of Commissary, and even yet he sometimes uses for certain pieces of business, a seal decorated with the episcopal mitre.

Thus far of the three other systems of local courts which were once the rivals of the Courts of the Sheriffs, and of how they fared in the contest. It remains for us to see how the Sheriffs' Courts themselves fared under the direction and control of the central power.

The central or royal power was used towards the Sheriffs in two ways. It favoured them: but it also controlled them. How their courts were favoured at the cost of the other local courts we have already seen. Another means by which they were favoured was by the new Acts of Parliament being directed to them. Thus the Sheriffs became often the only judges by

(d) For an interesting account of this practice, see Burton's *History of Scotland* (2nd ed.), vol. iii. p. 132.

(e) The inferior Commissary Courts were abolished in 1824 (4 Geo. IV. c. 97), and the Superior Commissary Courts in 1830 (11 Geo. IV. & 1 Will. IV. c. 69,

§ 30), when the Sheriffs and Sheriffs-Substitute were respectively made commissaries and commissaries' depute.

(f) The Sheriff Courts Act of 1876 finally abolishes the Commissary Courts and transfers their powers to the Sheriff Courts.

whom the statute law could be enforced. But of all the means used by the Crown to foster their jurisdiction, nothing compared at one time in force to the brieve system, and yet nothing helped the Crown more effectually afterwards when it wanted to withdraw the jurisdiction. The brieves had their origin in the same ideas as the charters. When in the conflict of jurisdictions in the mediæval times, questions arose as to which court had the power, a royal message addressed to one court, and defining the question to be tried, was a ready means of settling the difficulty. Naturally, almost every brieve issued was addressed to the Sheriff. What at first was used to settle a special difficulty, or to clear a doubt, came to be viewed as the ordinary means of commencing a process, and at last as the source of jurisdiction. These brieves were in use in every department of law, but mainly in regard to heritable rights; and they are still used, though their significance has long been lost.

I come now to consider the means by which the Courts of the Sheriffs were brought more under the control of the central authority.

There are not wanting indications that the first appearance of the royal authority in the County Courts in very early times was in the comparatively humble capacity of inspector—to see that the County Courts did justice. Complete evidence of this earliest step is wanting. So far as I know, we cannot trace the time when the representative of the central power appeared in the County Court in an inferior capacity; but we have numerous examples of district courts in which he could not appear at all, and at least one example (in a people of the same stock as ourselves) of his appearing on terms of equality with the local judge.<sup>(g)</sup> From these we may infer

(g) In Sweden, in the eleventh and twelfth century, the Bonders (or allodial proprietors) were under the jurisdiction of their chosen Lagaman. The King's

that the intermediate stage existed. If we thus bridge over the interval between the national and the tribal court, it explains some things not otherwise intelligible. The old court of the Justiciar, was exactly the Court of the Sheriff, and, except the act of presiding, the Sheriff did all that was to be done.<sup>(h)</sup> It explains the almost superstitious importance which the old laws attach to the presence of the Sheriff at the circuit. Over and over again the old statutes threaten him with all sorts of penalties should he fail to attend the Court; and, as some know, the idea that his presence is necessary has hardly yet died out. In whatever manner, however, the origin may be explained, the right of the King to intervene in the County Courts came at last to be fully acknowledged, and it was in partial operation at the opening of the historic period. The theory, as an old Act quaintly expresses it, was that "the King ride through the realm for the punishing of crimes;" and in practice the Royal Justiciars or Justice-Clerks made circuits administering justice, in the Sheriff Courts, in the King's name. In time these circuits came to be held regularly twice in the year, once on the grass and once upon the corn.<sup>(i)</sup> These formed the germ of the present Court of Justiciary. In due time the national power became sufficiently concentrated to enable it to develop a supreme central court exercising both civil and criminal jurisdiction.

The ultimate effect of the firm establishment of the Central Court on the local courts was two-fold. It made a large inroad on their jurisdiction, and it subjected their sentences to

men could not enter their Court without their permission, and when the King came the Legaman sat opposite the throne on a raised seat, on a footing of all but equality. (Palgrave and E. W.

Robertson, already quoted.)

(h) The old assizes were like the English, held as far as practicable for each county.

(i) 1483, c. 94.

review. I shall begin by noticing its effect, in both those respects, in criminal matters. Although, in the work which follows, I am concerned only with the Sheriff's civil jurisdiction, it is impossible in the historical part to confine the attention solely to it.

The Justiciars claimed a cumulative jurisdiction in all criminal matters. The right of the King to judge any matter at his pleasure "as it was wont to be" was asserted,(j) and the Justiciars judged in every matter, from the burning of green wood and salmon poaching(k) to the four pleas of the Crown. The next step was to assert a privative jurisdiction in certain more important matters. That the four pleas of the Crown were once competent within the Sheriff's Court, I think may be held as proved. Almost to the end they were competent within the courts of the regalities. Among the directions to the Chamberlayne, who made tours of inspection round the burghs, was one to see that the Burgh Courts did not meddle with the four pleas.(l) In the oldest charters, granted to Earls, the four pleas are specially reserved,(m) and "when bid by the Justiciar," the Sheriff still could try the four pleas.(n) Lastly, in one or two instances, the most important of the four pleas, murder, was till comparatively a late period competent in the Sheriff Court without any special authority.(o) Why we do not find more positive evidence of the competency of the four pleas is easily explained. The Sheriff Courts having, out of all the local courts, been taken as

(j) 1469, c. 26, may be taken as an example.

(k) See 1424, c. 33 and 35.

(l) See "Articuli inquirendi in Itinere Camerarii," printed in first volume of folio edition of Scots Acts.

(m) See William's Charter of Annandale, in the first volume of the National

Manuscripts of Scotland, lately published by Government.

(n) See the Assize of William, Scots Acts (fol.) vol. i.

(o) The Sheriff could try the doer of the murder if he were caught "that samin day, before the sun goe doun" (1426, c. 95).

it were under the royal patronage, would naturally be the earliest to obey the royal wishes.

With the exception of losing the power to try the four pleas, the Sheriff Courts suffered no other loss of power in criminal matters till comparatively recently. So long as capital punishment was indiscriminately awarded, the Sheriffs retained the power of inflicting it. Till within the last century, sentences of hanging and drowning were common. Other forms of corporal punishment were frequent. Flogging, for the benefits of which the public appears occasionally to revive a temporary affection, was a very common punishment. A common sentence also was that of banishment—of course only from the shire, which was the limit of the Sheriff's power. The Royal Courts alone had the power of banishing from the realm, and thus it has come that they alone possess the power of awarding the punishment of penal servitude, which has come in its place.

The rights of the Supreme Court to review the decisions of the Sheriffs' Courts has in criminal matters been only partially established. Simple as our notion of an appeal from a lower to a higher Court appears, it was only developed after intermediate stages. The first crude idea of an appeal does not touch the sentence. It is an appeal to the King to punish or censure the unjust judge. In the second stage there is a petition simply to set aside the sentence; and in the earlier forms of this stage it is generally found combined with the first.<sup>(p)</sup> It is not till the third and last stage is reached, that the Supreme Court is asked to take up the matter, and to pronounce the sentence between the parties which the justice of the case requires. In Scotland we have not in criminal matters advanced much, if at all, beyond

(p) 1471, c. 47.

the second stage, and we even retain reminiscences of the first. In some appeals in criminal matters the Sheriff may still be cited to appear before the higher Court,(g) and at each circuit he still "tholes an assize" for all the iniquities he has committed.(r) But these reminiscences of the first stage are harmless. It is, however, not so harmless, that we are still only in the rude second stage, and that the Supreme Court, in reviewing criminal sentences, seldom exercise any other power than that of simply affirming, or simply reversing. The power of review errs by defect and by excess. Sometimes an unjust sentence cannot be touched at all, and sometimes there is danger that a trifling mistake can be remedied only by allowing a serious crime to go unpunished.

I come now to consider the effect which the establishment of the Supreme Court had on the civil jurisdiction of the Sheriff Court. Notwithstanding various attempts by the Legislature to secure that certain actions should, as "of old," be pursued before the Judge Ordinary,(s) the central Court soon succeeded in establishing a co-ordinate jurisdiction in nearly everything which was competent to the Sheriff. The next step was to secure a privative jurisdiction in certain more important matters. The success in regard to heritable rights was complete. It was facilitated by various circumstances. The Sheriff's heritable jurisdiction was probably at the time of the institution of the central court a matter of very little practical importance. Questions of heritable right at that time would arise between barons very likely more powerful than the Sheriff himself, and his decree might have little value. As matter of fact, such cases were usually settled by the King and his council, or parliament. The practical part

(g) 20 Geo. II. c. 43, § 34.

(r) 1487, c. 103.

(s) 1424, c. 45; 1475, c. 62; 1487, c. 105; 1587, c. 42, &c.

of the Sheriff's heritable jurisdiction must of old have lain in settling questions between the smaller proprietors, in settling questions of boundary, allocating lands to widows for their terce, and other matters possibly of no great moment; but that he had a heritable jurisdiction, in theory concurrent with that of the Supreme Court, I think admits of no doubt. Much of it was exercised under the brieve system, which contained within itself the power of withdrawal. What of heritable jurisdiction remained after this power was made use of was finally disposed of by the Court of Session, which soon after its institution claimed the whole as its exclusive privilege.<sup>(t)</sup> The claim was at first enforced by the process of "advocation," by which the Supreme Court, on the plea of the importance of the matter at issue, removed the suit to their own Court.<sup>(u)</sup> The last step was for the Supreme Court to assert as a constitutional maxim that it was so entirely incompetent for the Sheriff to deal with the subject, that even when the parties made no objection he could not meddle with it.<sup>(v)</sup> Thus was completed the most serious inroad on the Sheriff's civil jurisdiction, and for at least two centuries prior to the change made quite recently, it seems to have been the fact that the most trifling question connected with the title to the most worthless fragment of land could not be settled in the Sheriff Courts, even when both parties consented to the jurisdiction. This evil has been remedied to a certain limited extent by an Act

(t) *Bishop of Aberdeen v. Ogilvie*, 1563, M. 7324.

(u) "The Lords have power to advocate from inferior courts, not only for iniquity but on account of the importance of the matter, such as the performance of a bargain relative to lands;" *Cuninghame v. Drumquhassie*, 1567,

M. 7409.

(v) In a competition as to a heritable right, the Court ruled that "a cause brought before an incompetent court cannot be removed into the Court of Session by advocacy and discussed there." *Gordon*, 1802, M. 12,245.



passed in 1877,<sup>(w)</sup> which gives, if neither party objects, a jurisdiction where the heritable property in dispute does not exceed £50 a year, or £1000 in all in value. This concession, such as it is, has been greatly appreciated. The most of the matters, other than heritable rights, in which the Court of Session obtained privative jurisdiction, were new matters, arising under new statutes, which conferred, or at least were held to confer, the power on it alone.

The right of the Court of Session to a cumulative jurisdiction in all cases has at various times been subjected by the Legislature to restraint. "To prevent the time of the judges from being wasted in small matters," actions under 200 merks Scots were declared incompetent to them. This limit was raised to £12, and ultimately to £25. In actions below the value of £25 the Legislature has made the decision of the Sheriff Courts final. This legislative provision has, however, been very strictly construed at the hands of the Supreme Court, for it is still held competent to have any amount of litigation over a very small value, if only it arise as the balance of a larger claim or be embodied in some specific article.

The right of review by the Court of Session in civil matters is far more complete than the corresponding review of the Justiciary Court in criminal matters. It is true that it is only within a very few years—namely, since 1868—that the idea of a simple appeal from the one court to the other was carried into practice. But the process of "advocation," cumbersome as it was, was worked so as to attain the same end. In general, its use so as to elude the Sheriff's jurisdiction was discouraged, actions not being appealed till they were decided; and the ultimate sentence pronounced was not limited to an affirmance or reversal of the inferior sentence, but was an en-

(w) 40 & 41 Vict. c. 50.

deavour to meet the justice of the case. In coming to a final decision, the Court moreover was not hampered by any inclination to accept the Sheriff's view as final upon any matter of law, fact, or discretion. Unfortunately this process of advocating, such as it was, was not held competent in all circumstances; and, among other inconveniences, it has resulted that the right of appeal, which was substituted for it in 1868, has only a limited application. If the process in the inferior court had been brought to an end by judgment having been issued, advocacy was, and appeal still is, in general incompetent. In such circumstances the remedy is the process of suspension or reduction, where the action commences almost of new, and the powers of the appellate court are of the crudest. Under them it sometimes happens that if an injured party takes an erroneous step in making his complaint, he would have been far better to have suffered the original wrong in silence, or even to have given some reward to the offender not to repeat the offence. These serious inconveniences, the remains of a system when the two courts were independent, may be hoped soon to disappear. Another curious limitation of the power of the Court of Session over the inferior courts, arising from the same cause, is to be found in the fact that they rarely call in their assistance. Although frequently annoyed with trifling actions, it is a very remarkable circumstance that the supreme judges never venture to remit causes to the inferior court. Perhaps some day they may do it. There have not been wanting preliminary indications of an assertion of the right, or at least of something very analogous to it. They have, with the usual appeal to "inherent power," which is common when written law and usage fail, asserted the right to order the Sheriffs' assistance in the conduct of causes, and to direct them to make investigations and reports

for their use.(x) Doubtless some day the whole right will be exercised. If it be done on the mere authority of the Court, it will be thought for the moment, and indeed it will be, a stretch of power, but it will be cheerfully acquiesced in; and the astonishment will be in a short time that it never was done before.

The history of the relations between the two courts is thus one of a continued increase in intimacy and closeness, and some day at last they will stand to each other as courts of higher and lower instance, with their relative powers and jurisdictions as sharply defined as if they were to be found in a code framed with the wonderful foresight of continental jurists.

Let me stop for a moment to see how far I have brought the argument. I have shown the probable origin of the Sheriff Courts; how they were enabled to extinguish their rival local courts; how their jurisdiction was curtailed by the Supreme Court; and how their decisions were subjected to its review. The changes I have connected with the slow carrying to completion of the great change, begun centuries ago, from tribal to national government. They seem to me to have been all due, directly or indirectly, to the increase of strength in the central power. It remains to me to show how the State acquired the entire control of the machinery by which the Sheriff Courts are worked.

Although from very early times the Sheriff was regarded as the representative within the county of the national authority, the relations between him and the Crown were for long of a very independent character. When the office was introduced, or revived in Scotland, the theory was that he was the king's Sheriff, and in our earlier laws he repeatedly obtains that

(x) *Dyce v. M'Lay*, 30th Oct. 1868, 7 M. 31.

title.(y) As such he in fact collected the Crown revenue, published the new statutes, and kept the king's peace. As such, also, the Crown asserted over him the right to appoint to and to remove from the office. But this power the Crown was for centuries too weak to enforce. At the very beginning the office is found in the possession of families as a matter of hereditary right. Public opinion occasionally sanctioned the Crown in superseding the hereditary Sheriff for a particular duty in which he had failed, by appointing a special Sheriff for the purpose. In graver cases it sanctioned his suspension for a period.(z) For gross misconduct, the Crown could exercise the power of forfeiting the office. But in those days the Crown always dealt with the Sheriff as with a person possessing independent rights, and centuries elapsed before the State could venture to treat the office as one to be gained and held by its servants as a matter of personal merit. It was only when the State had acquired considerable strength, and after circumstances had arisen showing strongly the necessity for exerting it, that it could obtain the thorough control of the appointment to the office of Sheriff. After the first Jacobite rebellion, the first serious inroad on the hereditary sheriffdoms was made; and after the second, they, in common with all the other hereditary jurisdictions, came to an end.

For long prior to 1748 there had been a division in the duties of the office, by which the non-legal part was exercised by the Sheriff himself, and the judicial part by a depute whom he appointed. The effect of this was to make two offices in the county. One, which for convenience may be called that of High Sheriff, was analogous to the English office of that name, or to that of Lord Lieutenant; but its

(y) He gets the same title in some of the Anglo-Saxon laws.—See Schmidt, cited *supra*.

(z) 1491, c. 30.

possessor had also the patronage of the other office of Sheriff-Depute or County Court Judge, and (originally) the power of selecting and dismissing him at pleasure. The separation between the offices was a concession to public opinion, and was one of many similar devices by which the owners of the hereditary jurisdictions endeavoured to make them keep pace with the times. In England, the lord of the manor was in certain circumstances bound to employ a qualified assistant in his court.<sup>(a)</sup> In Scotland, a control over the appointment of the depute began to be exercised over the Sheriffs so far back as the time of James VI., and perhaps earlier. In James's time there is an Act which requires the Sheriffs to submit the names of their deputies to the Court of Session annually for approval.<sup>(b)</sup> How far this Act was carried out I do not know; but, as we all know, the power which begins by exercising a *veto* ends, sooner or later, in getting the patronage. The result of the Jacobite rebellions was, that the separation between the office of High Sheriff and Sheriff-Depute, which had so long existed as matter of fact, became matter of law. Along with the other hereditary jurisdictions, the judicial powers of the High Sheriffs were declared to be forfeited. These were then declared to belong to the Sheriff's Depute, and the power of appointing the latter was handed over to the Crown. At the same time, what had long been customary was made absolutely necessary, and it was required that the depute should possess a legal education—the qualification fixed on being that of an advocate of three years' standing.<sup>(c)</sup> Thus, at last, the Crown gained the power of appointing the judges of the Sheriff Courts.

<sup>(a)</sup> *Maine's Village Communities*, 1587, c. 81.

p. 140.

<sup>(c)</sup> 20 Geo. II. c. 43, § 29.

<sup>(b)</sup> 1592, c. 126, which extended

The subsequent changes in the history of the office of Sheriff have little historical value. The office of High Sheriff was made an annual office, or one to be held during the king's pleasure, and it was conferred on one of the class to which the hereditary Sheriffs belonged. The title is still sometimes conferred, but as the duties left in the office were ill defined, and their performance optional, the appointment has, as was doubtless foreseen, become an empty dignity. Its holders are not even troubled to exercise the munificent hospitality which is the costly privilege of their English brethren. The entire interest in the office of Sheriff after the Act of 1748 centres for a while in the Sheriff-Depute ; but the parsimonious footing on which that office was established made it unequal to the position. The deputies in the time of the hereditary Sheriffs had (naturally) no salary, but were paid, in so far as they were paid at all, by fees which they exacted.(d) This resource was insufficient for a high class of professional judges ; but the Government, in place of giving such salaries as would secure the entire services of adequate men, provided only for the services of the deputies for a few months in each year. They were, therefore, paid small salaries, and were allowed to continue their practice at the bar. The effect of this, of course, was that they seldom or never resided in the county at all. The advocates who held the appointment came if there were suits to decide, but otherwise they remained in Edinburgh and attended to their practice. It was this fact which first brought into prominence the office of Sheriff-Substitute. This office had existed from very early, as a means of supplying the tem-

(d) The most important of the fees was the "sentence money," which was a twentieth of the sum decreed for (9 Scots Mag. p. 59). It shows the age

of this mode of payment, to find that the Brehon was paid in the same way, his share being a twelfth ; Senchus Mor, vol. i. pp. 233, 235

porary absence of the depute, and in 1748 the depute had had transferred to him the power of appointing the substitute. At first the substitute received no pay, and did no stated part of the work. He had also no legal qualification. But the protracted absences of the depute threw more and more of the duty on him. By-and-by it came to be considered decent that the depute should allow him a salary,<sup>(e)</sup> and then (towards the close of the last century) the depute succeeded in shifting the burden of paying it on the Crown;<sup>(f)</sup> and, last of all (in the beginning of the present century), he succeeded in throwing almost the whole burden of the work on the substitute. Side by side with these changes came another change, by which the depute came to be a judge of appeal from the substitute in the more important proceedings. The rise of the substitute into importance has been rapid. In 1787 he first received remuneration from the State, and became its servant.<sup>(f)</sup> By-and-by it was made essential that he should be either an advocate or a law-agent of a certain standing.<sup>(g)</sup> In 1838 he acquired in almost all respects the position of a judge.<sup>(h)</sup> The State then took him entirely into its pay, debarring him from following any other occupation, and giving him the right to hold his office during good conduct. In the second edition of this work, I ventured to say that everything showed that the Crown would soon assume the responsibility of appointing the Sheriffs-Substitute. That opinion has been verified. In 1877 the office was

(e) *Macevers v. Ross*, 1761, M. 18,435. It was "observed from the Bench that it was *contra bonos mores* to employ a Substitute without a salary." The dispute was as to the Sheriff-Substituteship of the island of Lewis, and the salary awarded was £25.

(f) The royal warrant placing the

Sheriff-Substitutes "upon the establishment of the civil officers of Scotland" is dated 9th October, 1787, but possibly salaries were paid by special grants for a few years before that.

(g) 6 Geo. IV. c. 23, § 9; see also 40 & 41 Vict. c. 50, § 4.

(h) 1 & 2 Vict. c. 119.

made a Crown appointment, and the last vestige of its ever having had anything else than a purely judicial character came to an end.(i) The office is now in all respects that of a judge.

In the earliest times there was of course no Sheriff-Clerk. We have become so accustomed to a record of the proceedings being kept, that it strikes us as a novelty to find that down even to the end of the last century much justice was administered verbally, with no record whatever. What happened till then in small causes was originally the rule. It was at first only in the most important cases that the Sheriff employed some one, usually a notary public, to reduce the proceedings to writing. By-and-by a regular clerk became necessary, and the Sheriff appointed him. The first interference of Government was in the shape of a provision that the name of the clerk should be submitted to and approved of by the Court of Session.(j) The last stage was for the Crown to assume the patronage and regulate the office.(k) The Procurator-Fiscal was originally a person appointed by the Sheriff to assist him in the duty of collecting the King's revenue. The function of the office has gradually but entirely changed. The least part of the duty is now concerned with the revenue, while the Procurator-Fiscal is now mainly occupied with the duty of prosecutor, which the parties injured originally performed. The law-agents were originally admitted by each Sheriff according to his own discretion.(l) For long, practitioners were scarce, and each Sheriff thought himself lucky if he

(i) 40 & 41 Vict. c. 50, § 4.

(j) 1587, c. 81; 1592, c. 126.

(k) This seems to have been done, without statute, by the Crown issuing commissions. In 1686 there is a statute (c. 20) declaring the power of

nominating clerks of the peace to belong to the Secretaries of State, and not to the justices.

(l) "A view of the office of Sheriff" by Robert Clark (1824), p. 244.



could attach a few respectable persons to his court. But in almost every case the agents in one sheriffdom were treated in the next as if they belonged to a separate kingdom. To reduce this state of confusion the central authority so far exerted itself as to make common rules for the admission of agents all over Scotland.(m) This stage lasted about half a century, and then the last came, by which the agents were treated as if they also belonged to a national system, and there became one set of law agents for all Scotland.(n)

I have now said, necessarily briefly, what I have had to say upon the history of the Sheriff Courts. The authority of the State, for long a mere name and theory, has at last become a living reality. Its active interference is now a thing so familiar, and we have been so long accustomed to look to it for the regulation of even the minutest details, that it is only with an effort that we can realise that it did not all along exist. Whither under its guidance are we now tending? This question, most will think, will be determined on practical considerations, but as the understanding of the past is necessary for that of the present, so I think, past progress may throw some light on the future. It will not, I trust, be considered irrelevant if I devote the few concluding sentences of this introduction to considering in what direction the lines on which we have been working will lead us.

As regards the staff of the Courts, I think the direction is, firstly, towards the clearer separation of the duties to be performed by the various officials, and especially to the separation of the duties of the Judge Ordinary from those of Judge of Appeal. Practically this separation is complete, the

(m) A. S., 12th Nov. 1825, cap. iv. § 1. (n) Law-Agents Act, 1878.

occasions on which the duties are still confounded being few and unimportant; and I anticipate that in a few years people will scarcely even remember that there was a time when the Judge Ordinary was liable to be superseded by the Judge of Appeal.

In the second place, I anticipate a considerable strengthening of the position both of the Judge Ordinary and of the Judge of Appeal. I doubt if the theory ever took shape, but there was a latent idea, not altogether exploded in some regions, that, provided there was a good Judge of Appeal, of easy access, it was of small consequence of what sort was the Judge Ordinary. It was a most mischievous idea. On the way in which the duties of Judge Ordinary are done depends in great measure the time which a litigation will last, the cost at which it will be conducted, and the clearness with which the points at issue will be brought out. To suppose that the Judge Ordinary can be kept right by having a Judge of Appeal always at his elbow is mere childishness. At the best this would always imply doing the work twice over, once wrongly, and then rightly. In this country the great importance of having a good Judge Ordinary is fully recognised in the Supreme Court, where the Judges Ordinary are selected from precisely the same men as the Judges of Appeal. I expect that the same necessity will be more fully recognised in the inferior courts. The Law Commission of 1868 recognised this in two respects—in the necessity of giving higher remuneration, and, in most instances, of giving more employment. Of the former I say nothing here, though much might be said in support of encouraging good men to accept the office of Sheriff-Substitute and exert themselves in it, and that not only by treating them with reasonable liberality in respect of remuneration, but also by rewarding such of them

as may have worked long and worthily for the public good in the lower, by promotion to some higher office. The necessity in many cases for giving more employment to some of the holders of the lower office is also important. Why we should rigidly adhere to the ancient county divisions, which, though they may have been well enough a thousand years ago, are often now quite unsuited for the territorial districts of our local jurisdictions, I can conceive no reasons except fanciful ones. It is surely time now to re-arrange all the districts, with a view to the best and most convenient mode of conducting the business.

In regard to the jurisdiction of the courts, although something has been done, I think everything shows that more must be done, until the result is reached that there is no question—or almost no question—involving a small pecuniary amount, which parties who cannot afford to go to higher courts, may not insist upon having determined, in the first instance at least, in the lower. The provisions of the Act of 1877 are incomplete. They partially opened the door of the Sheriff Courts to the trial of some questions which, whatever the amount involved, had hitherto been exclusively competent in the Court of Session, but they failed in one or other of two respects. If the new jurisdiction was to be limited to questions of restricted value, there should have been no power to remove the cases to the higher court. And if either party who chose, was still to have the option of the higher court, then the jurisdiction in the new matters, being simply one of consent, should have been unlimited in amount. It is to be expected that from time to time additions may be made to the jurisdiction of the Sheriff by transferring to him duties at present discharged by the other inferior courts. Perhaps this extension may be accompanied by a limitation; and it may

be found to have advantages to give to the Supreme Court a privative jurisdiction in those cases involving large pecuniary amounts, of which it practically has at present, or had till recently, the monopoly.

In the end it is possible that we may reach the simplicity with which it used to be thought we had started. It has not been found beyond the power of foreign Governments, or the ability of foreign jurists, to draw up codes, in which the jurisdictions of all the Courts, and their modes of proceeding, are set out in clearness and order. There is no reason creditable to our Government, or to our profession, why we have not now a code of procedure. The waste of money alone which occurs on account of ignorance of the proper court, or of the proper form of proceeding for ascertaining a right, is in this country an abuse, which is tolerated only because the facts are not generally known; and, in the present state of the law, it is impossible for the most careful judge or the most prudent practitioner to avoid error. We grope often in the dark for what ought to be as clear as day. I am under the mark when I say that it requires a Scotch lawyer to read not less than a hundred statutes, or less than a thousand decisions, before he can be said to have covered the field of Scotch law procedure. And it would be well if he could say that in the end he had found everything distinct. It is far from being so. The statutes and the decisions are alike fragmentary and confusing, giving the idea that nobody ever had time in our busy country to do more than provide in some way for the difficulty of the moment. How often in the future must justice miscarry before the remedy comes?

When our code of procedure does come, I trust it will not be a code for Scotland alone, but that, following the example of the recent Bills of Exchange Code, it will be one for the United

Kingdom.(o) The desirability of uniformity, with its corresponding simplicity, need not be pointed out; and now that judgments obtained in one part of the United Kingdom may be enforced in the others, the propriety of their being reached only after the same steps, and of their thus having the same value, is apparent. The difficulties in the way of framing a code of procedure for the United Kingdom are far less than are commonly imagined. The machinery for carrying out the law in the three kingdoms is, and cannot but be, essentially the same. Judges, with or without juries, counsel and agents, promoters and respondents, with registrars and clerks, and executive officers, are the persons concerned, and the limits within which their respective functions can vary are small. The extent of jurisdiction, and the law to be administered, may vary indefinitely, but differences in the mere law of procedure are mostly superficial. The things to be done are always the same. The promoter, whether called plaintiff or pursuer, has in some way to state his demand, and, in some shape, the facts on which he grounds it. The respondent, whether called defendant or defender, has, in like manner, to state his answer, with the facts on which it is grounded. Then the judge, either before or after inquiring into the truth of the respective allegations, has to decide on the relevancy or law. In the taking of the evidence, and in the pronouncing of the decision, there is no room for any differences except of the most merely formal character. Next comes the appeal. The mode of taking, arguing and deciding it admits of little or no variation. There might be differences between our practice and that of the sister kingdoms as to when an appeal should be competent, and as to the constitution of the appellate tribunal, but these

(o) The history of the Bills' Code, inclusive of its adaptation to Scotland, will be found in the Journal of the Institute of Bankers for December, 1882.

would not be irreconcilable ; and even if they were, the chapter of any procedure code which deals with appeals is always a short one, and it would be no great matter though in it, precise uniformity were not at present attained. The attainment of a uniform mode of procedure before the judge of the first instance is what first should be aimed at, and then the rest would shortly follow. I believe, therefore, that a code of procedure for the United Kingdom is at present practicable, and that its formation should be set about. To frame it well, however, will be a task of some time ; and in the absence, meanwhile, of a safer guidance which a code would give, I trust that the labour I have bestowed on the Treatise which follows will be of some service to the profession.

# PART I.

## OF THE CONSTITUTION AND JURISDICTION OF THE SHERIFF COURTS.

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### CHAPTER I.

#### OF THE CONSTITUTION.

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| 1. <i>The Principal Sheriff.</i>       | 6. <i>Commissary-Clerk.</i>  |
| 2. <i>Interim Sheriff.</i>             | 7. <i>Auditor.</i>           |
| 3. <i>Sheriff-Substitute.</i>          | 8. <i>Procurators.</i>       |
| 4. <i>Honorary Sheriff-Substitute.</i> | 9. <i>Officers of Court.</i> |
| 5. <i>Sheriff-Clerk.</i>               |                              |

**1. The Principal Sheriff.**—The principal Sheriff (a) is appointed by the sovereign by warrant under the sign manual. The qualification was fixed by the Heritable Jurisdiction Act at that of an advocate of three years' standing; and the office was appointed to be held *ad vitam aut culpam*. (b) The

(a) Throughout this work the word Sheriff is used in the sense which is at once strictly accurate and popular, as including both Principal and Substitute; and whenever it is necessary to distinguish between the two, the distinguishing adjective is used. The word Sheriff-Depute is in disuse; 9 Geo. IV. c. 29, § 22. The practice of using the word Sheriff, generally as including both officials, but sometimes as denoting only

the more honorary, is clumsy and inconvenient, and has led to litigations and other disagreeable incidents.

(b) 20 Geo. II. c. 43. Before his appointment the advocate must either have been in actual practice, or have been a Sheriff-Substitute; 1 & 2 Vict. c. 119, § 2. The oath to be taken on admission is contained in 31 & 32 Vict. c. 72, as explained by 34 & 35 Vict. c. 48.

Act also made various regulations as to residence for a certain part of the year within the sheriffdom, but these have all been abrogated, and none of the principal Sheriffs are now bound to residence, with the exception of those of Edinburgh and Lanarkshire, who, by a subsequent Act, must reside within six miles of Edinburgh and Glasgow respectively. The other principal Sheriffs are now bound only to hold certain courts annually within their sheriffdoms.(c) By Acts passed in 1853 and 1870 (d) their number was diminished, their duties having considerably changed both in amount and character through the effect of the legislation of the first half of the present century. From having been Judges Ordinary of the county, the principal Sheriffs have risen to be mainly Judges of Appeal on the decisions of the Sheriffs-Substitute, against which appeal to them is competent. But they still have the power of judging in the first instance when they choose to exercise it; and in some cases they are still bound to act in that capacity, as, for example, in the Small-Debt Circuit Courts, which they are bound by the Act of 1853 to hold once in each year. With regard to Sheriffs appointed since August, 1870, the Home Secretary has power to prescribe the courts they are to hold and the duties they are to perform personally.(e)

**2. Interim Sheriff.**—Till recently, there was no power to appoint any one to act as principal Sheriff in the case of his temporary illness or inability to act for other reasonable cause. The theory was that the Sheriff-Substitute took his place, and until the changes occurred which turned the principal Sheriff into a Judge of Appeal, this was sufficient, as it provided for the performance of all the duties of Judge

(c) 3 Geo. IV. c. 49; 1 & 2 Vict. c. 119, § 2; 16 & 17 Vict. c. 80, § 46; 33 & 34 Vict. c. 86. (d) 16 & 17 Vict. c. 92; 33 & 34 Vict. c. 86. (e) 33 & 34 Vict. c. 86, § 13



Ordinary. But when the principal Sheriff became practically an appellate Judge it was no longer sufficient, because his temporary illness or absence brought the appellate jurisdiction into suspense. To remedy this defect, power was given in 1876 to the Home Secretary to grant leave of absence to a principal Sheriff, and to appoint an interim Sheriff to act for him. The leave may be granted on account of temporary illness or other reasonable cause, and must be applied for by or on behalf of the principal Sheriff. It is granted for such period as the Home Secretary thinks proper. The interim Sheriff must either be the principal Sheriff of some other sherrifdom, or an advocate of not less than five years' standing. The interim Sheriff has all the powers and duties of the principal Sheriff.(f)

**3. Sheriff-Substitute.**—The Sheriff-Substitute is appointed by a commission granted by the sovereign on the recommendation of the Home Secretary.(g) The qualification is that he be an advocate or law agent of not less than five years' standing.(h) He holds office for life though he may be removed for inability or misbehaviour.(i)

The Sheriffs-Substitute from the time the office was reconstituted, after 1745, were prohibited from acting as factors and commissioners;(j) but they were permitted to carry on other business. As the office came gradually to require more and more of their time, and they came to assume more and more of the position of professional judges, it was felt that this was unseemly, and this liberty was curtailed. The Act of 1825, prohibited them from acting, directly or indirectly, as procurators,(k) and the Act of 1838 carried this farther by

(f) 39 & 40 Vict. c. 70, § 51.

(g) 40 & 41 Vict. c. 50, § 3.

(h) *Ibid.* § 4.

(i) *Ibid.* § 5.

(j) 21 Geo. II. c. 19, § 10.

(k) 6 Geo. IV. c. 23, § 10.

prohibiting them from acting as agents either in legal, banking, or other business, or as conveyancers, and from being appointed to any office, except such offices as are by statute attached to their own. The Sheriff-Substitute is bound to reside within his sheriffdom.<sup>(l)</sup> The place where he is generally to reside and attend for the performance of his duties, the number of courts he is to hold, with the times and places of holding, may all be fixed by the Home Secretary.<sup>(m)</sup>

Several of the larger sheriffdoms are divided into districts, to each of which a Sheriff-Substitute is attached, but the commissions extend over the whole sheriffdom.<sup>(n)</sup> In some cases the districts are conterminous with the counties which have been united to form the sheriffdom, and in other cases it happens that a county has itself been subdivided. Some lawyers, for what appear to me to be unsatisfactory reasons, maintain that there is an essential difference between these two classes of districts, and that they are still to be classified according to their origin,—holding (notwithstanding the very precise language of the Act of 1870) that the old counties still form virtually separate sheriffdoms. In any case, the number of the Sheriff-Substitutes is fixed by the Home Secretary.<sup>(o)</sup> It is also within the power of the Home Secretary to direct a Sheriff-Substitute to perform the duties of the office in a conterminous county.<sup>(p)</sup>

The Sheriff-Substitute is the resident Judge Ordinary of the county, with the full power (subject to such review as may be competent) of doing every judicial act which can be

(l) 1 & 2 Vict. c. 119, § 5. The section regulates the period for which the Sheriff-Substitute may be absent from the sheriffdom, and the provision which must be made for carrying on the business during his absence.

(m) 33 & 34 Vict. c. 86, § 14.

(n) 16 & 17 Vict. c. 80, § 40. 33 & 34 Vict. c. 86, § 12.

(o) 33 & 34 Vict. c. 86, § 14.

(p) 38 & 39 Vict. c. 81, § 2.

done by the Sheriff.(q) In the words of Lord Ormidale—  
 “Having regard to the terms in which the commission in favour of a Sheriff-Substitute is always expressed, as well as to the essential nature of the office, he is vested with and entitled to exercise (except when it should otherwise appear either from declarator or fair and necessary inference) all the power, jurisdiction, and authority pertaining to the office of Sheriff.”(r)

**4. Honorary Sheriff-Substitute.**—In addition to the salaried Sheriff-Substitute, it is the custom in all sheriffdoms to have one or more Honorary Sheriffs-Substitute, empowered to act for him during his temporary absence or incapacity. The Honorary Sheriffs-Substitute are appointed by the principal Sheriff.(s) There is no qualification required for the office, the provisions of the Act of 1877 upon that point, and those of the former Act of 1825 which it superseded, applying only to the salaried officials.(t) The restriction of the Act of 1825, that a Sheriff-Substitute may not be a procurator, is not held to apply to them. Were the Act held to apply, it would often be impossible to have any Honorary Substitutes.(u) In practice, law agents practising within the sheriffdom are often appointed. It is, of course, clear that an agent so appointed could not act in any cause in which he was himself in any way interested. The regulation in the Act of 1838, prohibiting Sheriffs-Substitute from acting as agents and in similar capacities, applies expressly only to

(q) There are some acts of an administrative character which a few special provisions in statutes have made competent only to the principal Sheriff, but with these the present volume is not concerned.

(r) *Fleming v. Dickson*, 19th Dec.

1862, 1 Macph. 188.

(s) 20 Geo. II. c. 43.

(t) 9 Geo. IV. c. 29, § 22; 40 & 41 Vict. c. 50, § 4.

(u) *Henderson v. Warden*, 1st March, 1845, 17 Scot. Jur. 271.

the salaried Sheriffs-Substitute. Honorary Sheriffs-Substitute are removable at the pleasure of the Sheriff, but the commissions do not fall by the fact of his ceasing to hold office.(v) The provisions which make it necessary that the commissions should extend over the whole sherrifdom, are as applicable to the Honorary as they are to the salaried Sheriffs-Substitute.(w)

**5. Sheriff-Clerk.**—The Sheriff-Clerk is appointed by the Crown. Although the counties which have been united into sherrifdoms, have, under the Act of 1870, disappeared as separate jurisdictions, it is still usual to appoint a separate Clerk to act for each of them ; and doubtless the Crown might, if it saw cause, make separate appointments for subdivisions of single counties. These things, however, can affect only the territory within which the Sheriff-Clerk may act, and in no other way touch his powers or duties, which are to act as Clerk in every matter in which the Sheriff and Sheriffs-Substitute have jurisdiction. He keeps the records of the court, and has important duties in connection with the summary execution which is competent on bills of exchange and other documents. He holds office, *ad vitam aut culpam*.(x) He is bound to do the duties of the office personally ;(y) but this does not prevent him from appointing deputies to assist him in the performance of his duties, or to act during his necessary

(v) 1 & 2 Vict. c. 119, §§ 3, 4, and 5. It was once held that the Sheriff-Clerk might be honorary Sheriff-Substitute, but this would not now be followed ; *Binning v. Cook*, 24th Jan. 1711, M. 7662. See *Stewart*, 22nd April, 1857, 2 Irvine, 614, and 29 S. J. 344.

(w) 16 & 17 Vict. c. 80, § 40 ; 33 & 34 Vict. c. 86.

(x) The principal regulations under which the present Sheriff-Clerks hold

office are contained in § 28 of 1 & 2 Vict. c. 119. Those appointed since that Act have no vested rights.

(y) 6 Geo. IV. c. 23, § 6 :—"Every person who has been appointed since the 1st day of August, 1814, or who shall hereafter be appointed a Clerk in the said Sheriff or Stewart Courts, shall discharge the duties of the said office personally."

absence.(z) Though there is no statute directly sanctioning such appointments, there are numerous statutes in which they are recognised. The Sheriff-Clerks and their deputies are prohibited from practising, either directly or indirectly, before their courts,(a) and if they do so, all the proceedings in which they have been thus concerned are null.(b) In suits in which they are personally interested they must not act as Clerks.(c) Where the Sheriff-Clerk is personally interested, the Sheriff must appoint a Clerk to act for him in the particular process.(d) It is incompetent for the Depute-Clerk to act, because he is dependent on the Principal; but where the Depute is concerned, there is no reason why the Principal should not act. Procurators who may be appointed deputies for the Small-Debt Circuit Courts are not disqualified from acting except in the court to which they belong.(e)

In the case of a vacancy in the office of Sheriff-Clerk, the Court of Session may appoint one or more persons to do the duties till the Crown make a permanent appointment. In vacation time, the Lord Ordinary on the Bills may make an

(z) *Heddlie v. Garioch*, 1st March, 1827, 5 S. 503. In this case the Commission contained (as it is believed usually to do) a power to name deputes; but the absence of such a provision would not alter the power, as the words of the Commission cannot confer it, and it must be possessed in virtue of the common law, or not at all. As to the Clerk's responsibility for the Depute, see Lord Chelmsford's opinion in *Watt v. Ligertwood*, 21st April, 1874, 1 R. (H. L.) 21.

(a) A. S., 10th July, 1839, § 160; A. S., 6th March, 1783. This prohibition does not apply to an unpaid deputy who

acts only occasionally (*Edie v. Rigg*, 18th Feb. 1879, 17 S. L. R. 36), though of course such a person could not act in any cause with which he was himself connected.

(b) *Smith v. Robertson*, 27th June, 1828, 5 S. 848.

(c) *Manson v. Smith*, 8th Feb. 1871, 9 M. 492.

(d) *Macbeth v. Innes*, 8th Feb. 1873, 11 M. 404. As to the power of the Sheriff to appoint a clerk to act temporarily on an emergency, see further, *Galbreath v. Sawers*, 13th Nov. 1840, 3 D. 52.

(e) 1 Vict. c. 41, § 25.

appointment which will be valid till the Court meets. The interim appointment is usually made on the application of the Lord Advocate.(f)

**6. Commissary-Clerk.**—By Acts passed in 1824 and 1830 the old Commissary Courts were suppressed, every sheriffdom was made a Commissariat, every Sheriff a Commissary, and every Sheriff-Substitute a Commissary-Depute.(g) But, in theory, the Commissary Courts still existed. In all commissary business, the former designations of the judges were carefully used, and not only was the name of Commissary-Clerk kept up with equal care, but the office was frequently held by a person different from the Sheriff-Clerk. This state of matters continued till 1876, when the Commissary Courts were finally abolished, and their whole powers and jurisdictions transferred to the Sheriff Courts.(h) The office of Commissary-Clerk at the same time came to an end, subject to two exceptions, the one of a permanent, and the other of a temporary character. The permanent exception is in favour of the Commissary-Clerk of Edinburgh, whose office is kept up in consequence of special duties being assigned to it.(i) The temporary exception is in favour of those Commissary-Clerks who were not Sheriff-Clerks, or, being Sheriff-Clerks, were remunerated by fees.(j) Such continue, while they hold office, to discharge their duties, but they do so now in the Sheriff Court. Their powers remain unchanged. They are bound to perform the duties of the office in person,(k) though they may

(f) Lord Advocate, 16th Oct. 1880,

8 R. 12.

(g) 4 Geo. IV. c. 97, §§ 6, 8, and 10; and 11 Geo. IV. and 1 Will. IV. c. 69, § 30.

(h) 39 & 40 Vict. c. 70, § 35.

(i) *Ibid.* § 38.

(j) *Ibid.* § 39. See also §§ 36 and 37.

(k) 4 Geo. IV. c. 97, § 14:—"Every person henceforth to be appointed a Commissary Clerk shall perform his duty in person."

appoint deputies. They are prohibited from practising, either directly or indirectly, before the Sheriff Courts<sup>(l)</sup> in any cause in which they act as clerk.<sup>(m)</sup>

**7. Auditor.**—An Auditor of Court is usually appointed by the Sheriff, and holds office during his pleasure. The office may be held by the Sheriff-Clerk or by one of the agents, and there is no restriction upon the auditor engaging in practice. He taxes such accounts as are remitted to him, and is remunerated by fixed fees.

**8. Procurators.**—The admission of Procurators is regulated by the Law-Agents Act, passed in 1873, which accomplished the important object of making uniformity on the subject in the courts of law in Scotland.<sup>(n)</sup> The Act, with various Acts of Sederunt,<sup>(o)</sup> passed to carry it into effect, makes the following conditions in regard to the qualifications of an applicant for admission :—

1. That he be 21 years of age ;
2. That he serve an apprenticeship to some competent master ; of five years in the ordinary case, or of three years in certain exceptional cases ;
3. That he pass certain examinations in general knowledge and law ;
4. That he produce evidence of having attended certain University Law Classes ; and
5. That after his admission, which is by the Court of Session, he cause himself to be enrolled in the Courts where he desires to practise.

Apprenticeships must be served with some practising law agent, or with a Sheriff-Clerk who was in office at the passing

(l) A. S., 6th March, 1783.

(m) 39 & 40 Vict. c. 70, § 39.

(n) 36 & 37 Vict. c. 63.

(o) Printed in the Appendix.

of the Act. They must be served under indenture, which must be registered within six months of the commencement. The shorter period of three years is competent in the case of persons who have acted five years as clerk to a practising law agent ; of graduates in arts, advocates, barristers, and English solicitors.

The examinations are conducted by a board of examiners appointed by the Court of Session. Before beginning the apprenticeship there is now an entrance examination in general knowledge. This is not required where the applicant is one of those entitled to be admitted on the shorter apprenticeship on the ground of being a graduate, advocate, barrister, or English solicitor, or where he has given a certain attendance during three sessions in the arts department of a University, or where he has passed the principal examination in general knowledge. This examination may take place either before or after the apprenticeship. The subjects prescribed for it are, the history of Great Britain, geography, arithmetic, book-keeping, Latin, and the elements of either logic or mathematics, as the candidate may prefer. The last examination is in law, and is not taken till the apprenticeship is complete. It embraces the whole law of Scotland, both civil and criminal ; the forms of process in both departments, and conveyancing. The examination in law must be held in Edinburgh, and the others are usually held there also.

The University classes which are imperative before examination are Conveyancing and Scots Law. They must be attended in separate sessions, and the applicant must have taken part in the class examinations. The provision for attending these classes is not contained in the statute, but is an addition made to it by the Court of Session, under the power to make Acts of Sederunt. Farther information as to agents



will be found in Mr. Bagg's careful treatise on the subject, published soon after the Act of 1873 passed. The Act contains some exceptional provisions in favour of those who had begun their apprenticeship or attended classes before its passing, but to these it has been thought unnecessary to refer in the text.

It is not essential that every litigant in the Sheriff Court should appear by a procurator. Litigants may appear and plead in their own behalf, and may lodge papers signed by themselves alone.(p) The only point in regard to this which is doubtful is, whether a party may by himself take out a writ. The doubt, however, is created mainly by the words of a regulation requiring a summons or petition to have the name of the procurator marked on the back,(q) and this, it seems to the author, cannot be taken as more than an incidental provision—directory of what is to be done if the pursuer has a procurator, but not compelling him to have one, or taking away his common law right, in the absence of express regulation to the contrary, to act for himself. Where a procurator appears for a party, and a question arises as to his authority, the proper course is to direct him to produce a mandate.(r)

The privilege of "borrowing processes" is possessed by procurators alone.(s) The Clerk of Court cannot intrust the proceedings to parties over whom the Court has little or no control, and for whom no one is responsible. Parties pleading their own causes must be content to see the process in the office of the Clerk. Farther, it is only procurators who have places of business within the jurisdiction of the Court, that is, within the sheriffdom, who can borrow.(t)

(p) A. S., 10th July, 1839, § 63.

(s) A. S., 10th July, 1839, § 159.

(q) A. S., 10th July, 1839, § 8.

(t) Law - Agents (Scotland) Act,

(r) Hepburn v. Tait, 12th May, 1874,

1873, § 15; 33 & 34 Vict. c. 86, § 12.

1 R. 874; A. S., 10th July, 1839, § 30.

The Procurator-Fiscal is the procurator who is charged with the prosecution of criminal offences on behalf of the Crown. In a work which extends only to practice in civil causes it is unnecessary to treat of his office. There are extremely few civil cases in which his intervention is required, and his functions in regard to these will be noticed in connection with them.

**9. Officers of Court.**—Sheriff-Officers are the persons by whom writs are usually served and executions carried out in the Sheriff Courts. They are admitted by the Sheriff, to whom they apply by a petition, which may be remitted to two or more of the procurators in order that they may examine the applicant as to his qualifications. In some sheriffdoms the Sheriff conducts the examination himself. On the applicant being found duly qualified he is admitted, and the oath *de fidei* administered. He then requires to find caution for the due performance of his office. Should his cautioners die or resign, their place must be immediately supplied. Sheriff-Officers continue to act during their good conduct; and for misconduct may be dismissed or suspended by the Sheriff.

A Sheriff-Officer can in civil matters act only within the jurisdiction of the Sheriff who has admitted him, except in Small-Debt and Debt-Recovery actions, where he may serve warrants in other counties after getting them indorsed by the proper Sheriff-Clerk.<sup>(u)</sup> Messengers-at-Arms may also (it is said) execute writs in the Sheriff Court,<sup>(v)</sup> but it has been doubted whether they can act in Small-Debt cases. Sheriff-Officers may in turn act in some cases in writs issuing from the Court of Session.<sup>(w)</sup>

<sup>(u)</sup> 1 Vict. c. 41, § 34; 30 & 31 Vict. 1867, 4 Paton, 443.

c. 96, § 5.

<sup>(w)</sup> 31 & 32 Vict. c. 100, § 19.

<sup>(v)</sup> See *Finlayson v. Innes*, 28th Feb.

Some regulations as to the admission of Sheriff-Officers, which have been adopted in various sheriffdoms, will be found in the Appendix.

## CHAPTER II.

OF THE MATTERS IN WHICH THE SHERIFF  
COURT HAS JURISDICTION.

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**1. Introductory.**—The simplest description of the extent of the jurisdiction of the Sheriffs Courts is to say that it extends over every kind of right, with only two important exceptions. There being in Scotland no recognised separation between law and equity, there is no exception to the jurisdiction on that ground. The exceptions arise (1) in questions as to the title to heritable property; and (2) in questions as to status and legitimacy, depending on the validity or invalidity of any alleged marriage, divorce, or separation. There are other important exceptions to the jurisdiction, which arise from its being incompetent to ask for certain remedies in the Sheriff Court, and these will be considered in the following chapter. In the meantime it is necessary to consider more in detail the rights on which the Sheriff Court can, or what is the same

thing, must decide, for in all the matters in which the Sheriff has jurisdiction, he is compelled, like every other judge, to exercise his functions. (a)

**2. Moveable Rights.**—In rights relating to moveable or personal property the jurisdiction of the Sheriff is unlimited. There may be certain remedies which, except within certain limits, he cannot give, but, there is no question as to moveable right which either its nature or amount prevents him from deciding. Thus, he decides in all questions arising out of mercantile transactions,—sales, loans, bills of exchange, partnership accounts, executory contracts, contracts of service, contracts with carriers, and the like; and that whether the question is as to the right to specific implement of an obligation, or as to the right to damages for non-implement.

**3. Actions of Damages.**—Among the actions of damages for breach of contract which the Sheriff Court can entertain, are actions of damages for breach of promise of marriage, there being here no question raised as to status. Other actions on breach of contract do not require to be particularised. In addition to such actions, the Sheriff may try questions as to the right to damages for delict, such as arise in actions of damages for slander and libel, seduction, assault, or any injury to person or property, whether accidental or intentional.

**4. Privative Jurisdiction in Moveables.**—Where the value of the action does not exceed £25 sterling, the Sheriff Court has a privative jurisdiction. It is incompetent to raise such an action in the Supreme Court, (b) or (except to the

(a) *Gow's Trustees v. McCall*, 28th May, 1875, 2 R. 729.

(b) 50 Geo. III. c. 112, § 28:—“All

causes not exceeding the value of twenty-five pounds sterling shall, from and after the passing of this Act, be carried on

limited extent permitted by the Small-Debt Act) to appeal such an action from the Inferior Court.(c)

**5. Heritable Rights.**—As already pointed out, the Sheriff Court till recently could not decide on questions affecting the title to heritable property, however small in value the property might be. By the Sheriff Courts Act of 1877, most actions relating to such questions may now be brought in the Sheriff Court, provided the value in dispute does not exceed the sum of £50 by the year, or £1000 value.(d) The action can be raised only in the jurisdiction within which the subject in dispute is situated, and to that jurisdiction all parties concerned may be convened. If there be any question as to the value of what is in dispute the Sheriff (in such way as he thinks expedient) inquires into and determines it, and (as far as concerns the competency of bringing the action in the Sheriff Court) his determination is final. If the Sheriff finds that the value exceeds the statutory amount, he may either dismiss the action, or, on the motion of the pursuer, transmit it to the Court of Session. It is optional to the defender in all cases to acquiesce in the action remaining in the Sheriff Court, or to take it to the higher Court. If he adopts the latter course he must, at some time before the lapse

in the first instance before the inferior Judges." The Act (1672, c. 16, § 16) had enacted "to the effect, the Lords of Council and Session may be in better capacity to discuss the processes which come before them, not being overburdened with small and inconsiderable causes, that all causes not exceeding the value of two hundred marks Scots [about £11, 2s. 6d.] be in the first

instance carried on before the inferior Judges." The point whether an action does or does not exceed the value of £25 is considered under Appeals to the Court of Session.

(c) 16 & 17 Vict. c. 80, § 22.

(d) 40 & 41 Vict. c. 50, § 8 (1). The actions still excluded are adjudications, except in so far as already competent, and reductions.

of six days from the closing of the record, lodge a note praying for the transmission of the process to the Court of Session. When a case has to be transmitted there the Sheriff Clerk sends it to the keeper of the rolls of the First Division.(e) In making use of the powers given by the Act of 1877, the practitioner should bear in mind that as they are of an exceptional kind, the initial writ should show on its face that the Sheriff has jurisdiction, and should therefore cite the statute and set forth that the value is within the prescribed limit,—though doubtless if these things were omitted, the Sheriff would allow an amendment.

In all cases, which cannot be brought under the Act of 1877, when disputes arise in regard to heritage, the power of the Sheriff Court is confined to that of regulating the interim possession. For this purpose it may pronounce what are called possessory judgments ;(f) and those are founded mainly upon the state of possession as it has existed for the preceding seven years. This state of possession the Sheriff can protect from interruption ; or, if it has been disputed, may regulate.(g) Thus, for example, the Sheriff secures from summary interruption a party who has been in peaceable possession of an heritable subject for seven years, though he has no *ex facie* title, provided he allege the existence of a right ;(h) but he cannot decide the question whether a title is good, or, if there be two titles produced, which of them is the better. In such cases it is his province to regulate only the possession till

(e) 40 & 41 Vict. c. 50, §§ 9 & 10.

(f) "Possessory actions are those in which the point of right is not directly concerned, but barely that of possession." *Erskine's Institute*, iv. i. 47.

(g) *Sutherland v. Thomson*, 29th Feb. 1876, 3 E. 485. Under this power of regulation it was here held, that the

Sheriff might authorise gates to be put across a public road though none had been there previously.

(h) *Bridges v. Elder*, 5th March, 1822, 1 S. (N. E.) 351, or (O. E.) 373. For the sake of keeping the peace, he might prevent even an intruder from being forcibly dispossessed.

the dispute is settled by the competent Court, and he cannot look at the titles for any other purpose than that of assisting him to decide on the possessory point.(i) And it is only if a title be *ex facie* clear that he can look at it even for this purpose. If the title be ambiguous, the Sheriff must sist the process till the ambiguity be cleared up in the Court of Session.(j)

In a question between a party having a title and a party alleging none, the Sheriff may dispossess the latter, though his possession may have been longer than the seven years, there being no question of title involved;(k) and it will not make a question of title, that a party who has produced none, simply challenge, or deny, the title of the party producing one.(l) In other cases the seven years possession has been disregarded. Where the public had possessed a footpath for upwards of seven years the Sheriff was nevertheless held entitled to dispossess them, on its being shown that many years previously the road had been shut up by proceedings *ex facie* regular.(m) These proceedings had taken place in virtue of a statute, and it would rather appear that wherever the legality of any fact turns upon the construction of a statute, and not upon a title, the Sheriff has jurisdiction to determine as to it, though the fact should affect heritable property.(n)

#### 6. Nuisance and Servitudes.—There are two matters

(i) *Maxwell v. The Glasgow and South-Western Railway Co.*, 16th Feb. 1866, 4 Macph. 447; *Johnston v. Murray*, 5th March, 1862, 24 D. 709; *Liston v. Galloway*, 3rd Dec. 1835, 14 S. 97.

(j) *Cruickshank v. Irving*, 23rd Dec. 1854, 17 D. 286; *Lowson's Trustees v. Cramond*, 16th Nov. 1864, 3 M. 53.

(k) *Nisbet v. Aikman*, 12th Jan. 1866, 4 Macph. 285.

(l) *Pitman v. Burnett's Trs.*, 26th Jan. 1882, 9 R. 444.

(m) *M'Kerron v. Gordon*, 15th Feb. 1876, 3 R. 429. Lord Gifford dissented.

(n) *Carswell v. Nith Navigation Trs.* 23rd October, 1878, 6 R. 60.



relating to heritable rights in which the Sheriff Courts have by special statute full jurisdiction. These are matters of nuisance arising from the use of real property, and questions of servitudes. In regard to these they are entitled to decide, not merely in so far as regards the question of possession, but also in regard to the question of right. Thus, where anything is complained of as a nuisance, the Sheriff Court is not precluded from ordering its discontinuance upon proof that it has existed for more than seven years; and in the same way in regard to servitudes, it is not limited to considering the state of possession for the preceding seven years, but it may enter into all such questions as those affecting title, immemorial possession, or prescriptive possession, requisite for the decision of the question of absolute right, and it may pronounce decisions affecting the right itself.(o)

**7. Leases and Rents.**—The Sheriff Court has jurisdiction to entertain all questions, not turning on the title to the land, which may arise between landlord and tenant in regard to the fulfilment of the conditions of letting, and in particular in regard to the payment of rent. In practice, actions frequently occur in which the question has first of all to be determined whether a lease for one, or, it may be, more years has been entered into between the parties, and the competency of such actions is settled.(p) After the lease has been established, the Sheriff may order implement of any of the conditions which the parties have either expressly or by force of law undertaken. For example, the common law obligation on a tenant to stock

(o) 1 & 2 Vict. c. 119, § 15; Brown v. Currie, 1st Feb. 1848, 5 D. 463; Thomson v. Murdoch, 21st May, 1862, 24 D. 975; Gow's Trustees v. McCall, 28th

May, 1875, 2 R. 729.

(p) Robertson v. Cockburn, 22nd Oct. 1875, 3 R. 21.

a farm(*q*) or furnish a dwelling-house,(*r*) may be enforced by decree in the Sheriff Court, though apparently not in the former case under the penalty of ejection. If the lease have come to an end, and there be any dispute as to whether the premises have been left in proper order, the Sheriff may order them to be inspected, and, if necessary, repaired.(*s*) The Sheriff Court has ample jurisdiction in disputes about rent. It sequestrates if the rent be not paid in time or there be reason to fear its loss. It decides all questions as to whether rent is due by the tenant; as to its amount; and as to any deductions to be made from it. And generally, it decides all questions arising between the landlord and the tenant as to the terms of leases, or other writings on which possession is held. Such a question, for example, as whether a tenant was entitled to compensation for improvements, could be decided in the Sheriff Court.

**8. Feu-Duties.**—Where no question of heritable right is raised, the Sheriff Court can entertain actions for the payment of feu-duties, annual-rents, or other sums due for the occupation of heritable property under longer tenures than mere leases. But except by giving decree for the sums thus due, when the heritable right to them is not in dispute, in the same way as if the action were for a personal debt, it cannot interfere. It cannot, for example, pronounce a decree of irritancy *ob non solutum canonem*, so as to remove the vassal—excepting always, under the statute of 1853,(*t*) in the special case of the subjects not exceeding in yearly value the sum of twenty-five pounds.

(*q*) *Horn v. M'Lean*, 19th Jan. 1830, 8 S. 329.

(*r*) *Wright v. Wightman*, 30th Oct. 1875, 3 R. 68.

(*s*) *Dickson v. Graham*, 12th May, 1877, 4 R. 717; *Gordon v. Melrose*, 25th June, 1870, 8 M. 906.

(*t*) 16 & 17 Vict. c. 80, § 82.

**9. Removings and Ejections.**—The Sheriff Court has jurisdiction to decide all actions of removing at the instance of a landlord against a tenant whose right to occupy has expired. It decides upon the question (if it be in dispute) whether the tenant's right has expired ; and it has power to settle all questions in regard to the conditions on which the occupancy is to be ceded. It is hardly necessary to add that it decides on such actions of removing, whether raised under the special Act of Sederunt regulating them,<sup>(u)</sup> or under the Act of 1838,<sup>(v)</sup> or under the Act of 1853 ;<sup>(w)</sup> but it is requisite to point out that its jurisdiction under these Acts is privative.

Ejections differ from removings in this, that they are not the bringing to an end of a legal title of possession, but the removal of a person who alleges no title, or whose title has already been brought to an end by decree of a competent court or otherwise.

**10. Special Matters relating to Heritage.**—Under various special powers the Sheriff Court can entertain various other matters relating to heritable subjects, such as actions of constitution and adjudication ; of adjudication in implement ; of mails and duties ; of straightening marches ; of the division of common lands ; certain proceedings in connection with entails, &c., but as the jurisdiction thus conferred is exercised in special forms of actions which will have to be treated of afterwards, the extent of the jurisdiction will also be treated of then.

**11. Questions of Status.**—The Sheriff Court has no jurisdiction to entertain questions of rank or status. It cannot, for example, entertain any question whether any person is entitled to the status of wife, or to that of legitimate child of

(u) A. S., 14th Dec. 1756.

(w) 16 & 17 Vict. c. 80, § 29.

(v) 1 & 2 Vict. c. 119, § 8.

another. Neither can it pronounce a divorce, or even a decree of separation *a mensa et thoro*, or any decision in questions between husband and wife depending on the right of one or other to these remedies. The Sheriff has no power to deal with the matter of the permanent custody of children, with the exception, it has been said, that he may interfere to enforce or protect the legal title of a parent ;(x) but in all cases of emergency he may regulate the interim custody.(y)

**12. Actions of Aliment.**—In aliment cases the Sheriff Court has jurisdiction. It is the usual court in which actions for the aliment of illegitimate children are raised ; and for the purposes of these actions it decides incidentally questions of filiation. These actions, however, though usually called actions of aliment, are properly actions of debt ; but the Sheriff Court has also jurisdiction in the proper equitable action of aliment. For example—no question of status being raised—it decides questions as to aliment between parent and child, or even between husband and wife. But wherever any question is raised affecting status,—as, for instance, whether a husband is entitled to exercise all the rights by law belonging to him, or whether he has forfeited any part of them by cruelty or desertion,—the power of the Sheriff Court is limited to awarding interim aliment for such reasonable time as will permit the injured party to raise the question of her right to permanent aliment before the higher court.(z)

**13. Succession.**—In matters of succession the Sheriff Court has an extensive jurisdiction. In moveable succession, the

(x) *Herd v. Ellis*, 20th Aug. 1864,  
8 Scot. Law Mag. 143.

(y) *Fraser on the Law of Parent and Child*, by Cowan, p. 81, and authorities there cited. *Hood v. Hood*, 24th Jan.

1871, 9 M. 449.

(z) 11 Geo. IV. and 1 Will. IV. c. 69, § 32, and *infra* "Of Actions of Aliment."

Sheriff (in certain special proceedings), not only decides all questions as to who is to have the management of the estate of the deceased, but (in the Ordinary Court) he also decides all questions relative to its distribution. In regard to heritage, his duties are limited to the service of heirs under the Titles to Land Consolidation Act. The jurisdiction of the Sheriff in matters of succession in so far as exercised in the ordinary forms of action, requires no separate notice. In so far as exercised under the special forms for the service of heirs, and the appointment and confirmation of executors, it will be explained fully in Part V.; and as more germane to it than to any other part of this treatise, the powers which the Sheriff has of dealing with the estates of parties who are presumed to be dead because they have disappeared, will also be considered there.

**14. Bankruptcy and Insolvency.**—In bankruptcy and insolvency the Sheriffs have also jurisdiction. Their jurisdiction in bankruptcy cases is extensive, and is regulated under special statutes. As these statutes have been made the subject of several excellent treatises, and as their consideration would unduly increase the dimensions of this work, bankruptcy will not be here treated. In insolvency the duty of the Sheriff is concerned with the liquidation of small estates under the process of *cessio bonorum*, and with the giving or refusing of personal protection, in a very few cases where imprisonment for debt is still competent. That process has of recent years had its nature entirely changed, and it is practically a process of liquidation which it would be impossible to explain adequately without introducing a large part of bankruptcy law. In regard to it, the reader is therefore referred to the writers on bankruptcy.

**15. Judicial Factors.**—Under their old jurisdiction as Commissaries, the Sheriffs have always been in the way in matters of moveable succession of appointing factors to act for persons, who though entitled by law to the office of executor, were incapacitated by age or otherwise from fulfilling its duties. By a special statute,<sup>(a)</sup> they have a farther power of appointing Judicial Factors to look after the estates of pupils or insane persons, when these estates are of small value. These various powers will be considered afterwards, in the part treating of special actions and the part treating of succession.

**16. Admiralty Jurisdiction.**—In maritime cases the Sheriff has in the first instance the same jurisdiction, within his territory and the adjoining seas, as the High Court of Admiralty formerly possessed over Scotland; and in all maritime cases under the value of £25 he has privative jurisdiction. These matters will be treated of in the portion of this work dealing with maritime cases.

**17. Poor Relief and Lunacy Acts.**—Under the Poor Law Acts the Sheriff decides certain questions as to the right of paupers to relief, and under the Lunacy Acts he decides as to the commission of lunatics to asylums. The forms for the Poor Law proceedings will be considered in their proper place, but the forms for the proceedings in lunacy cases are so completely regulated by special statutes that no good could be attained by repeating their provisions here.

**18. Elections.**—In regard to the election of Members of Parliament, the Sheriff has also numerous duties to perform, but as these are in no way connected with his ordinary duties

(a) 43 & 44 Vict. c. 4.

in civil causes, and have besides been made the subject of an excellent special treatise, they will not be treated of here.

**19. Conclusion — Incidental Treatment of Incompetent Matters.**—It is needless here to go over the different instances in which the Sheriff exercises special powers, as these, where of any importance, and where it will be of any service, will be noticed in the chapter treating of the special actions in the Sheriff Court. One observation only is needed to complete the survey of the Sheriff's jurisdiction, and it is this,—that the Sheriff Court may have occasion to entertain incidentally matters upon the absolute right to which it could pronounce no decision. Thus, if the question at issue in a case be simply whether or not a certain debt is due, the Sheriff Court may determine incidentally (in order to find out if that debt is due) questions such as those of status and legitimacy.<sup>(b)</sup> But in this case its decision will have no weight upon the question of status. It will decide merely whether or not the particular debt is to be paid, and there its effect will end. In like manner, though the Sheriff cannot in his Criminal Court decide upon what are called the Four Pleas of the Crown with a view to the punishment of the offenders, he can decide upon them in the Civil Court when they are made the foundation of a claim for damages. The ramifications of this principle are both various and extensive, and it is important to have it in mind, as its application is of almost daily occurrence.

(b) *Wright v. Sharp*, 16th Jan. 1880, 7 R. 461.

## CHAPTER III.

OF THE REMEDIES COMPETENT IN THE  
SHERIFF COURT.

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| 1. <i>Introductory.</i>           | 5. <i>Competent Remedies—Orders for</i> |
| 2. <i>Declarators.</i>            | <i>Payment of Money.</i>                |
| 3. <i>Proving the Tenor.</i>      | 6. <i>Orders ad factum præstandum.</i>  |
| 4. <i>Reductions Incompetent.</i> | 7. <i>Special Remedies.</i>             |

**1. Introductory.**—The remedies competent in the Sheriff Court vary greatly, according to the nature of the rights involved. In general, where the Sheriff Court has jurisdiction to deal with a matter it can give all the remedies which are required; but (except in a few special instances) the remedies which the Sheriff Court gives are all in their nature precise and specific. They direct either the payment of some precise sums of money, either specified at once or to be ascertained in some specified manner, or they direct that some one shall do or refrain from doing some specified act. The Sheriff Courts do not (except to a very limited extent) entertain any of that class of actions competent in the Supreme Courts of Scotland which simply either affirm or negative the existence of a right and then leave it to some subsequent process to carry the conclusion into effect. The exclusion of these actions seems to rest on usage.

**2. Declarators.**—Actions of declarator are therefore in general incompetent in the Sheriff Court whatever may be the subject matter with which they deal. It is not merely



declarators of marriage, or declarators as to rights in heritable property, which are thus incompetent; but declarators in regard to rights in moveable property, and other matters with which the Sheriff Court is otherwise competent enough to deal, are also as a general rule incompetent.(a) The mere introduction into a petition (otherwise competent) of declaratory expressions, does not, however, render the action incompetent, the declaratory conclusions being taken as merely introductory to the proper petitory conclusions. Thus, it is competent in an action of removing to insert a declaratory conclusion that the irritancy on which the removing is to follow has occurred.(b) In the older practice such declaratory findings were frequently asked for, but they are rarely asked for now; and the practice should be avoided, both because it raises questions of competency, and because it is in itself ill adapted to the forms of process now in use.

The exceptional cases in which actions of declarator are competent in the Sheriff Court occur under the Act of 1877. Under that Act, the Sheriff may entertain declarators relating to questions of heritable right or title, to the limited extent to which he may entertain other actions as to such matters—namely, in cases where the value in dispute does not exceed the sum of £50 by the year, or £1000 value.(c) In like manner, he may entertain declarators relating to the property in, or right of succession to, moveables, where the value of the

(a) See *Grierson v. School Board of Sandsting*, 21st Jan. 1882, 9 R. 437, and *Stobbs v. Caven*, 14th March, 1873, 11 M. 530, where the question arose whether the Sheriff Courts, having plenary jurisdiction in servitudes, could not entertain declarators about them.

(b) *Taylor v. Boyle*, 9th March, 1824,

2 *Shaw's Appeal Cases*, 30; *Hall v. Grant*, 19th May, 1831, 9 S. 612. It is no objection to a petitory action that a right must substantially be declared before the conclusions can be reached; *Murdoch v. Wyllie*, 8th March, 1832, 10 S. 445.

(c) 40 & 41 Vict. c. 50, § 8.

subject in dispute does not exceed the sum of £1000.(d) As, however, almost every possible question as to moveables can be settled in an ordinary petitory action, this latter power will not be of much service. The forms under which these actions of declarator proceed will be noticed in the part dealing with special actions.

**3. Proving the Tenor.**—Actions of proving of the tenor, being a species of action of declarator, are also incompetent, unless they be of such a kind that they may be fairly brought as declarators under the exceptional powers noticed in the preceding article as having been given by the Act of 1877.

Thus, an action to prove the tenor of a lost bill is in general not competent before the Sheriff Court,(e)—the pursuer in such a case having always, however, the remedies given him by the Bills of Exchange Code.(f) And as an action of proving the tenor of a lost deed must always precede a petitory action founded on the deed, it is impossible, except to the limited extent already explained, to obtain a remedy on a lost deed in the Sheriff Court. This, however, should not exclude a proper petitory action, founded not upon the lost deed, but upon the consideration for which it was granted, where such a separate action is otherwise competent.

**4. Reductions Incompetent.**—Actions of reduction are also incompetent in the Sheriff Court. A Sheriff Court Judge has no jurisdiction to determine by any such action how far a party is entitled to be freed from a written contract,(g) or

(d) *Ibid.* § 8.

(e) *Carson v. M'Micken*, 14th May, 1811, F. C.

(f) 45 & 46 Vict. c. 61, §§ 69 and 70; Thorburn on Bills of Exchange, p. 159;

Wilson's edition of Thomson on Bills, p. 204, &c.

(g) *Young v. Robertson*, 24th Nov. 1830, 9 S. 59.

from the written laws of any society or corporation which he may have joined.(h) The ground upon which reductions are incompetent is broader than that which relates to the incompetence of declarators, for the fact that an action even involved a reduction was in general sufficient to prevent the Sheriff from proceeding with it, and his duty used to be to sist it till a reduction was brought in the Court of Session.(i) Thus, he cannot in general entertain a reductive conclusion as introductory to a petitory conclusion in the way in which he might have entertained a declaratory conclusion. Where, however, the Sheriff was satisfied that the deed was fraudulent, he was not bound to enforce it.(j)

The necessity, however, of now sisting actions, when a question arises as to the validity of a deed, in order that a reduction may be brought in the higher court to settle it, has been very much obviated. It has been provided by the Act of 1877, that "when in any action competent in the Sheriff Court a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof." Thus if a pursuer bring an action founded on a deed, a defender may defend himself on the ground that it was obtained from him by force or fraud. In like manner, if a pursuer, suing for a sum of money, is met by a receipt, he may object to it on similar grounds. And in both these cases, the pleas, if otherwise relevant, will be disposed of in the Sheriff Court, and it will be unnecessary to wait for any action of reduction. In order to prevent such pleas being

(A) *Fleishers of Glasgow v. Watson*, 20th Nov. 1824, 3 S. 305; *Porteous v. The Cordiners of Glasgow*, 11th June, 1830, 8 S. 908.

(i) *M'Laren v. Steele*, 13th Nov. 1857, 20 D. 48.

(j) *Brown's Trustee v. Fraser*, 31st May, 1870, 8 M. 820.

taken for the mere purpose of creating delay, the Sheriff has power to order a party objecting by way of exception to a liquid document of debt to find such caution or make such consignation as may be thought proper.(k)

An important exception from the old rules had previously been made by statute with reference to deeds or alienations of property which are void under any of the Bankruptcy Acts,(l) and this exception is still of use, as its terms, though applicable only to a special case, are with reference to it, somewhat wider than the general exception just noticed. Such deeds or alienations may be set aside in the Sheriff Court as well as in the Court of Session. This, however, must not be understood to have made it competent to raise a simple reduction of one of those deeds in the Sheriff Court.(m) The effect of it is, when a question as to the validity of such a deed is raised by a Sheriff Court action, to allow that question to be determined in the particular action, and for the purpose of that action. The Court having thus jurisdiction to dispose of the matter, the insertion of a reductive conclusion by way of introduction to the proper petitory conclusions is not fatal to the action. It might be better left out, because no reductive decree could be pronounced, but it could have no effect in rendering incompetent, conclusions otherwise competent.(n)

### 5. Competent Remedies—Orders for Payment of Money.

—The forms of action which are competent are sufficiently

(k) 40 & 41 Vict. c. 50, § 11.

(l) 19 & 20 Vict. c. 79, § 10; 20 & 21 Vict. c. 19, § 9.

(m) *Dickson v. Murray*, 7th June, 1866, 4 Macph. 797. This action contained nothing but reductive conclusions.

It was dismissed.

(n) *Moroney v. Muir*, 5th Nov. 1867, 6 Macph. 7. This action contained a reductive and a petitory conclusion: The former was dismissed and the latter sustained.

numerous. To begin with, there is the ordinary petitory action, concluding for the payment of a definite sum, either at once or at some future time, in one sum or by instalments. The action of count and reckoning concludes for such sum as may be found due after investigation into the accounts between the pursuer and the defender. The action of multiplepounding is brought into court to have the rights of different competitors to possess or share some fund or moveable property determined. Actions of aliment conclude for payment of it for certain periods, more or less extensive. These are the ordinary forms of action in which the payment of money is concerned.

#### 6. Competent Remedies—Orders *ad factum præstandum*.

—Actions which require a party to do or to refrain from doing a certain act (*ad factum præstandum*) are competent and may or may not be combined with conclusions for the payment of money. In petitions for interdict the complainer seeks to have some parties prohibited from doing the acts complained of; and in other forms of action parties may seek to have others enjoined to do certain things. Thus they may seek to have the defender ordained to sign some deed,<sup>(o)</sup> or to fulfil a contract,<sup>(p)</sup> or to deliver up bills or other documents wrongly withheld.<sup>(q)</sup>

(o) *Corbet v. Douglas*, 5th March, 1808, Hume, 346. This case, and that of *E. Aberdeen v. Laird*, 7th Feb. 1822, 1 S. 278 (O. E. 294), show that the deed may relate to heritage, provided the objections to signing it be not such as to raise questions of heritable right. The action is incompetent if such a question be raised; *Cox v. Kerr*, 25th Oct. 1873, 1 R. 60; *Anderson v. Fraser*,

29th June, 1871, 43 S. J. 508.

(p) *E. of Moray v. Pearson*, 11th June, 1842, 4 D. 1411. In this particular case the Court entertained doubt about the action because the defence raised a question of heritable right, but the general competency was admitted.

(q) *Riddell v. Christie*, 20th Nov. 1821, 1 S. 145 (O. E. 151).

**7. Special Remedies.**—It is needless to enumerate the kinds of remedy which the Sheriff can give in the cases in which he has by statute or common law a jurisdiction of a special kind. The more important of those cases themselves were enumerated at the end of the last chapter, and it is enough to say here that the Sheriff necessarily gives the remedy appropriate to the jurisdiction, and to delay saying more until those matters come to be treated of in detail.

## CHAPTER IV.

OF THE PERSONS OVER WHOM THE SHERIFF  
COURT HAS JURISDICTION.

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**1. Modes of giving Jurisdiction.**—In general, questions of jurisdiction arise only in the case of defenders. Any one, no matter where resident, or whether he be a foreigner or a Scotchman, may stand as pursuer. There are proceedings by which persons not resident in Scotland may be made to find security for expenses; but the right of such persons to apply to the Court is complete in itself.

With respect to defenders, there are various modes of constituting jurisdiction. The most ordinary ground of jurisdiction over a defender is by reason of his residing within the territory (*ratione domicilii*); but we shall also have to consider when parties are liable to the jurisdiction by reason of carrying on business within the sheriffdom; or by reason of having engaged to do something within it (*ratione contractus*); or because the thing about which they are disputing is within it (*ratione rei sitæ*); and lastly, to what extent the

jurisdictions recognised in Scotland over parties who happen to have property (heritable or moveable) within the territory are applicable to the Sheriff Courts.

**2. Residence.**—The residence required to give jurisdiction over a defender must not be confounded with domicile. The residence meant is the actual residence which the person has for the time being, whether it be temporary or whether it be permanent. To prevent too much uncertainty as to whether there is jurisdiction or not, the rule has been adopted that the residence is held sufficient to found jurisdiction if the defender has been within the territory for forty days before citation. But provided the forty days are passed, no other condition is required; and the residence may have been in a friend's house, or in a hotel, or in a common lodging-house; may have been without any intention of remaining; or may have been taken up for the express purpose of founding jurisdiction.(a) Shorter residence than forty days will be sufficient to found jurisdiction if the defender come to the county *animo remanendi*,—for instance, if he takes up his house in it. In such a case the jurisdiction begins with the residing,(b) and it continues there although the defender personally may be seldom in the house for more than a few days at a time.(c)

A person is not necessarily limited to one jurisdiction. If a person have a permanent town residence and a permanent country residence, each occupied in turn as it suits, he may be cited at either.(d) But if a person were cited at one of

(a) *Joel v. Gill*, 10th June, 1859, 21 D. 929; Ersk. 1, 2, 16.

(b) *Home v. Eccles*, 30th July, 1725, M. 3704.

(c) *Irvine v. Deuchar*, 13th March, 1707, M. 3703.

(d) *Spottiswood v. Morison*, 15th July, 1701, M. 4790.



his houses, when reasonable inquiry would have shown that he and his family were then occupying the other, the citation might not be sustained.(e)

Jurisdiction by residence is lost in two ways,—in one way immediately, and in the other way after the lapse of forty days. If a person give up his residence in one county, and go with his family, servants, and furniture, and take up his residence at some known place in another sheriffdom, jurisdiction over him by residence is transferred at once to the Sheriff of the new sheriffdom. If, on the other hand, he leave without taking up some other residence in Scotland, his former residence remains for forty days as the proper place for citing him, notwithstanding that it is not occupied either by his family or by his servants. After that time, if nothing be known to the contrary, he is presumed to be out of Scotland, and, if citable at all, must be cited edictally.(f)

Persons who have no fixed place of abode must be cited where they can be found.(g) Thus, a person who travelled the country as an emigration agent was held subject to the jurisdiction of the Sheriff of Inverness upon a personal citation given to him there.(h) Soldiers and sailors are cited at the dwelling-place which they occupy when on shore or at home from duty, even though they have not resided there perhaps for more than a

(e) *Gordon v. Campbell*, 30th Dec. 1702, M. 3702.

(f) *Wightman v. Wilson*, 9th March, 1858, 20 D. 779; 6 Geo. IV. c. 120, § 53.

(g) *Linn v. Casadino*, 24th June, 1881, 8 R. 849. The pursuer resided in England, and the debt was contracted there. The defender, a Greek by birth, travelled as a picture-dealer over the

United Kingdom, and had no fixed residence. He was cited personally in Scotland, but had not at the time been forty days in it. The jurisdiction was sustained. The case was a Court of Session one, but the principle is equally applicable to the Sheriff Court.

(h) *M'Niven v. M'Kinnon*, 14th Feb. 1834, 12 S. 453; *Lees v. Parlan*, 12th Nov. 1709, M. 4791.

day or two at a time, and even though the house should not belong to the person himself, but to a relative.(i)

Wives are subject to the jurisdiction of their husband's principal residence, or possibly, in the event of his having two residences, to the jurisdiction of either of them.(j) But unless the wife be actually with the husband, it would not appear that she would be subject to a jurisdiction under which he had fallen merely by residing forty days within it at some house not his own. Children who are above puberty and under age may be cited at their father's residence, even though they be almost of age and are not resident there at the time, provided their father's house be still their home and their absence be only temporary, for example, for the purpose of education.(k) But when a young person, though not of age, resides from home and maintains himself, the practice is to cite him at his own residence. The trustees of a deceased party may competently be sued before the Sheriff of the sheriffdom where the deceased lived, and where the heritable property which they managed was situated, though the majority of their number lived in another sheriffdom.(l) In the same way, it is thought that executors would be liable to the jurisdiction of a sheriffdom where the deceased lived, where the executors were confirmed, and where the estate was being wound up, though the majority of them should actually be resident without the sheriffdom.

**3. Carrying on Business in Sheriffdom.**—Carrying on business in a sheriffdom, and having an office there for that purpose, is in some cases a ground of jurisdiction. With respect

(i) *Brown v. M'Allan*, 14th Feb. 1845, 7 D. 423.

(k) *Steel v. Lindsay*, 24th Nov. 1881, 9 R. 160.

(j) *Ringer v. Churchhill*, 15th Jan. 1840, 2 D. 307.

(l) *Black v. Duncan*, 18th Dec. 1827, 6 S. 261.

to individuals, it was formerly not enough by itself, but along with other circumstances it sometimes was. Thus, a law-agent who resided in Renfrewshire, but carried on business in Glasgow, was held subject to the jurisdiction of the Glasgow Magistrates, in an action requiring him to return certain title-deeds which had been left and were still lying at his Glasgow office.(m) In another case, an opinion was expressed that a person carrying on business within a burgh, though not residing there, would (if cited personally) be liable to the jurisdiction of the burgh Magistrates in an action arising from his business.(n) And by a special statute, persons engaged in the herring-fishing trade within the territory, or within ten miles of the coast, were made subject to the Sheriff's jurisdiction, in the same manner as if they were inhabitants.(o) But the jurisdiction formerly had over persons carrying on business and not residing within the territory, was of so narrow or doubtful a character that the matter was dealt with by the Sheriff Court Act of 1876. Section 46 of that Act enacted that "A person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county." It will be observed that before the Sheriff can have jurisdiction under this provision it must be the fact, *firstly*, that the defender carries on a trade or business within the territory, *secondly*, that he has a place of business within it, and *thirdly*, that he is domiciled in another county. It has accordingly been settled that a party who merely interferes to wind up a business and does not intend to carry it on, does not fall under it.(p) What trade or

(m) *Ritchie v. Wilson*, 15th Feb. 1837, 15 S. 693.  
 1828, 6 S. 552. He had been cited (o) 48 Geo. III. c. 110, § 60.  
 personally. (p) *Ferguson v. Dyer*, 25th Feb.  
 1882, 9 R. 671. The defender was a

business would be thought sufficient has not been settled, but unless the words are used in some technical sense, there seems little room for the doubts which have been expressed, whether carrying on a farm, which is usually considered very much a matter of business, falls within them. It has equally been doubted whether a farm-house could be considered as a place of business. The necessity for a domicile in another county prevents the jurisdiction operating in the case of persons who are domiciled out of Scotland.(q) As the statute uses the words "any action," it would appear that the jurisdiction is not limited to actions arising out of the trade or business carried on, or to those arising within the sheriffdom.(r) In order, apparently, to prevent inconvenience from this cause, a power has been given to the Sheriff to remit the action to the court of the defender's domicile. To give jurisdiction under this provision, the citation must be given either personally or at the place of business.(s) In consequence of the peculiar way in which the Act of 1876 is worded, it is doubtful whether the jurisdiction given by the clause extends to anything except proceedings in the Ordinary Court, although it certainly is quite as much required in the Debts Recovery and Small-Debt Courts.(t)

The power given by the Act of 1876 applies also in the case of partnerships, the word "person" being defined by the Act to include "company, corporation, and firm."(u) But in the case of any company, even though it be a fictitious one, judicial factor, resident in Edinburgh, and was winding up the estate, situate in Lanarkshire, of a deceased farmer who had resided there. It was held that he was not subject to the jurisdiction of the Sheriff of Lanarkshire.

joint tenant of a farm in Scotland, but resided in Ceylon.

(r) Mackay's Court of Session Practice, vol. i. p. 183.

(s) 39 & 40 Vict. c. 70, § 46.

(t) *Ibid.* § 2.

(u) *Ibid.* §§ 46 and 3.

(q) *M'Bey v. Knight*, 22nd Nov. 1879, 7 R. 255. The defender here was

and consist only of one partner, it has long been well recognised at common law that the having of a place of business in a sheriffdom is a sufficient ground of jurisdiction in all actions arising out of business conducted there.(v) This jurisdiction cannot be taken away by implication. Thus, a statutory enactment providing for a railway company being cited at its head office does not take away the jurisdiction of the Sheriffs in whose territories it has stations.(w) If the office of any company in a sheriffdom be not the head office, the jurisdiction at common law is limited to causes of action arising within the district. Thus, if a railway company have its head office in Inverness-shire, and branch offices in Elgin and Banff, it is not competent at common law to raise an action against the company in the county of Banff upon a cause of action arising in the county of Elgin,(x) though under the Act of 1876 it could be done. Jurisdiction on the ground we have been considering ceases with the dissolution of the company, and does not subsist to the effect of rendering the former partners liable to the jurisdiction.(y)

**4. Making Contract soluble in Sheriffdom.**—If a person undertake to perform some contract within a sheriffdom, he is liable to the jurisdiction of the Sheriff, provided he be personally

(v) *Bishop v. Mersey and Clyde Navigation Steam Company*, 19th Feb. 1830, 8 S. 558; *Young v. Livingstone*, 13th March, 1860, 22 D. 983; *Harris v. Gillespie*, 5th Jan. 1875, 2 R. 1003.

(w) *Aberdeen Railway Company v. Ferrier*, 28th Jan. 1854, 16 D. 422. The requirements as to citation must, of course, be complied with. In an unreported case, Lord Jerviswoode, affirming Sheriff D. M. Smith, held that a clause in a railway Act, that

“the domicile of the company with reference to all judicial proceedings or actions at law shall be held to be the town of Inverness,” did not exclude the jurisdiction of the Sheriff Court of Elgin.

(x) *Edward v. Inverness and Aberdeen Junction Railway*, 24th April, 1862, 4 Irv. 185.

(y) *M'Eachern v. M'Pherson*, 3rd July, 1824, 3 S. 211.

cited within the territory.(z) This important ground of jurisdiction, well known in the Supreme Courts, was in some danger of being lost sight of in the Sheriff Courts; but it has been decided to apply to them, and (as has been pointed out by the present Lord President) it is a kind of jurisdiction which it is important that the Judge Ordinary should possess. It has long been recognised that in some actions a person must be liable to the jurisdiction when personally cited within it, as, for instance, in an action of aliment for a child; in an action of restitution of a moveable newly seized by him or hired; or for payment of things newly bought by him for ready money;(a) but it has now been decided that the jurisdiction of the Sheriff Court upon this ground rests upon the same principles as, and is co-extensive with, that of the Court of Session. It has also been laid down that it is immaterial though the person who has contracted to perform, and who has been cited within the territory of the Sheriff, is a foreigner, since the expression that the Court of Session is the *commune forum* of foreigners applies only to such foreigners as are actually out of Scotland, and who require to be cited edictally.(b)

Jurisdiction founded on this ground, however, warrants only such actions as are necessary for the enforcement of the contract, or as arise directly out of its non-fulfilment. It is not to be taken as warranting all the actions that may arise out of the contract. For example, if, after the contract has been fulfilled and the price paid, one of the parties should raise an action of damages, alleging that it had not been fulfilled

(z) In the Sheriff Court of Stirling, Dumbarton, and Clackmannan, jurisdiction on this ground has been sustained against a person cited personally in another sheriffdom, but this is going farther than the authorities warrant.

See Journal of Jurisprudence for 1882, p. 217.

(a) *Per* Lord Mackenzie in *Ringer v. Churchhill*, *ante*, note (j).

(b) *Pirie v. Warden*, 20th Feb. 1867, 5 Macph. 497.

completely, that action could not be brought in the forum of the *locus solutionis*,<sup>(c)</sup> even after personal citation, unless there were some other ground of jurisdiction. On the other hand, an action of damages for breach of the contract may be so brought.<sup>(d)</sup>

The same principle would make a person who has committed a delict within a sheriffdom, subject to the jurisdiction in an action of damages founded on it, provided he were personally cited within the territory.<sup>(e)</sup>

**5. Thing in Dispute situated in Sheriffdom.**—Jurisdiction is also founded in many cases by the fact of the thing about which parties are disputing being within the territory, although the parties themselves should be beyond it. Thus, under the Act of 1877, actions relating to heritable right or title, or to division of commonities, or division, or division and sale, of common property, are brought in the Sheriff Court of the county in which the property in dispute is situated.<sup>(f)</sup> Again, under the Act of 1876, if an arrestee reside within the territory, the action of furth-coming necessary to make the debt available to the pursuer may be raised within it, though the common debtor reside elsewhere; and in the same way if the holder of a fund which is the subject of a multiplepounding reside in the sheriffdom, the action may be raised there though the claimants reside elsewhere.<sup>(g)</sup> But at common

(c) See *Logan v. Thomson*, 24th Jan. 1859, 3 *Irv.* 323.

(d) *Sinclair v. Smith*, 17th July, 1860, 22 *D.* 1475.

(e) *Kermick v. Watson*, 7th July, 1871, 9 *M.* 984.

(f) 40 & 41 *Vict. c. 50*, § 8. As the Act says that "all parties" in such

actions are to be subject to the jurisdiction of the Sheriff; it would appear that even foreigners might be cited under the powers for so doing given by the Act of 1876.

(g) 39 & 40 *Vict. c. 70*, § 47. The powers here given are apparently available only in the Ordinary Court (§ 2),

law, the Sheriff has also in some cases a jurisdiction arising from the thing in dispute lying within the territory. Thus, an action of removing, not containing personal conclusions, is competent in the Sheriffdom in which the subjects lie, though the defender should be beyond it.<sup>(h)</sup> On the same ground an action of ejection would also be competent against the person who, though resident elsewhere, occupied with his goods premises situated within the jurisdiction ; and if a person were by himself or his agents wrongly to fail to deliver goods lying within the jurisdiction, it would appear that he might be liable to an action to compel him to make delivery, though he himself should not be within the jurisdiction.<sup>(i)</sup> As a last illustration of this kind of jurisdiction, may be mentioned the competency of a party bringing a petition for the sale of grain before the Sheriff of the county where it was lying, though the other party interested in it resided in another sheriffdom, and though an action between the two was going on about it in the Court of Session.<sup>(j)</sup> All these cases agree in this, that they were cases in which parties were disputing about the possession or custody of the property in question.

**6. Possession of Property within Sheriffdom.**—The possession of heritable property within Scotland is a ground of jurisdiction in the Supreme Court in all kinds of actions,

but they seem available against foreigners, whom the statute gives power to cite (§ 9). Similar powers (except as to foreigners) are contained in the Small-Debt and Debt Recovery Acts.

(h) *Williamson v. Haigie*, 28th Nov. 1635, M. 4815.

(i) *Per* Lord Deas, *Scottish Central Railway Company v. Ferguson, Rennie & Co.*, 30th March, 1863, 1 Macph. 750. Although Lord Deas was in the min-

ority in this case, his opinion on this point is not contradicted by the other Judges, and is directly supported by the Lord President.

(j) *Bannatyne v. Newendorff*, 22nd Jan. 1841, 3 D. 429. The action in the Court of Session was about the price of the grain ; and the petition to the Sheriff Court was to have the grain sold and the proceeds consigned, so as to avoid charges for warehousing.



except those relating to status,<sup>(k)</sup> but it has been decided that it does not form a ground of jurisdiction in the Sheriff Court ; and as the jurisdiction is an anomalous one the want of a practice to justify it was alone decisive against its existence.<sup>(l)</sup> The possession of moveable property also within Scotland may be made the ground of jurisdiction in the Supreme Court by the process of arrestment *ad jurisdictionem fundandam*. In the Sheriff Court, it is only in two exceptional cases that arrestment founds jurisdiction. In any action, an arrestment is good to found jurisdiction against a foreigner, if a ship or other vessel belonging to him, or of which he is part owner or master, shall have been arrested within the sheriffdom.<sup>(m)</sup> In maritime actions, where the Sheriff Courts have (also by statute) a jurisdiction over foreigners, there is implied a power to found jurisdiction by arrestment, and in them it would, as the power is given in general terms, be sufficient to arrest property of any kind.<sup>(n)</sup> In all other cases the power seems not to exist. At common law, an arrestment against a foreigner not also personally cited within Scotland, does not found jurisdiction in the Sheriff Court ;<sup>(o)</sup> and although it has not been decided whether jurisdiction could not be founded in this way against a foreigner who was personally cited within the sheriffdom, the proceeding being unknown in practice, could not be recommended. Nor has it been decided whether the process of arrestment *ad fundandam jurisdictionem* can be used to found jurisdiction against a Scotchman domiciled in

(k) *Ferrie v. Woodward*, 30th June, 1831, 9 S. 854 ; *Kirkpatrick v. Irvine*, 23rd June, 1838, 16 S. 1200.

(l) *M'Bay v. Knight*, 22nd Nov. 1879. 7 R. 255.

(m) 40 & 41 Vict. c. 50, § 8.

(n) See *infra* "Maritime Causes" among the Special Actions.

(o) *Burn v. Purvis*, 13th Dec. 1828, 7 S. 194 ; *Harvey, Hall, & Co. v. Black*, 21st June, 1831, 9 S. 785 ; but a foreigner may by his actings bar himself from stating the plea of want of jurisdiction ; *White v. Spottiswoode*, 30th June, 1846, 8 D. 952. See *supra*, art. 2.

another county but having property within the county in question ; but here again the practice is unknown.

**7. Exemptions from Jurisdiction — Crown.**—The only exemption from the jurisdiction of the Sheriff Court now of consequence is that of the Crown, which may insist that certain actions shall be brought against it only in the Court of Exchequer. Those actions are actions on any matters connected with the Revenue, or with the proceedings of officers of the Revenue, or with certain matters relating thereto, all particularly set forth in the statute erecting the Court of Exchequer.<sup>(p)</sup> The exemption of the Crown extends to all persons acting in the matters in question under the authority of the Crown.<sup>(q)</sup> The remedy, should any of the lieges bring, or threaten to bring, any such action against the Crown or one of its servants in the Sheriff Court, is for the Crown to apply for an interdict to the Lord Ordinary of the Court of Session who is appointed to decide in Exchequer causes.<sup>(r)</sup>

**8. Former Privileges of College of Justice.**—The Members of the College of Justice (which includes the judges, counsel, procurators, and clerks of the Supreme Court) formerly had the privilege of suing certain actions in the Court of Session, which other parties would have been obliged to bring in the Sheriff Court, and they had also the privilege of declining to be sued before any other than their own Court. Those privileges served only to permit unworthy members of the profession to harass the public. After various invasions, made by the Small-Debt and other Acts, both of the privileges were in the end abolished. The privilege which members of the

(p) 6 Anne, chap. 26, § 6.

11 S. 378.

(q) Black v. M'Lachlan, 12th Feb. 1833,

(r) 19 & 20 Vict. c. 56, § 14.

College had as pursuers was abolished by the provision of the Court of Session Act of 1850, which enacted that no member should be entitled to institute any action or proceeding, whether original or by way of review, before the Court of Session which could not have been instituted by him before such court if he had not been a member.<sup>(s)</sup> The privilege the members had as defenders was abolished by the Sheriff Court Act of 1853, which enacted that no person should be exempt from the jurisdiction of the Sheriff Court in any cause on account of privilege by reason of his being a member of the College of Justice.<sup>(t)</sup>

**9. Other Claims of Exemption.**—Various bodies, such as the Commissioners of Supply for counties, and the Magistrates of burghs, which combine somewhat of the functions of a court of law with administrative functions, have asserted claims to be exempt from the jurisdiction of the Sheriff Courts. In so far as such bodies exercise proper judicial functions, it is clear that their decisions are not liable to the review of the Sheriff Court. In so far, also, as such bodies act in carrying out statutes, in the exercise of statutory powers, it would appear that they are exempt from the jurisdiction of the Sheriff Court. The exemption, however, extends only in as far as they have acted within the powers, judicial or administrative, conferred on them by statute or common law. Thus, if a parochial board sue by ordinary action for recovery of assessment, the Sheriff is not tied down to enforcing ministerially their demand, but may inquire into its legality.<sup>(u)</sup> And it seems clear that in all cases in which such bodies act as administrators of property, or as corporations, that is, *inter alia*, in all

(s) 13 & 14 Vict. c. 36, § 17.

(t) 16 & 17 Vict. c. 80, § 48.

(u) *M'Tavish v. Caledonian Canal Commissioners*, 3rd Feb. 1876, 3 R. 412.

questions of contract or of damages, they are liable to the jurisdiction, just in the same manner as bodies are which have no claim to the character of courts. Thus, the Commissioners of Supply of Lanarkshire were held subject to the jurisdiction of the Sheriff Court in an action by the Inspector of Weights and Measures for payment of his salary as duly fixed by the Justices of the Peace.<sup>(v)</sup> In another case, the Magistrates of a burgh were held subject to the Sheriff's jurisdiction in a question between them and a neighbouring proprietor as to his right to erect a fence on the banks of a river.<sup>(w)</sup> In similar circumstances, the guildry of a town were held to be subject to the jurisdiction.<sup>(x)</sup> In contrast to these cases comes one, in which it was held that the Sheriff could not grant interdict to prevent the carrying out of an order given by a judge of the police court of a burgh in exercise of statutory (though not of judicial) powers.<sup>(y)</sup>

#### 10. Persons Prorogating the Jurisdiction of a Sheriff.—

Certain objections to the jurisdiction of a Sheriff Court may be waived. Those are, objections of a kind personal to the objector. Where the objection to the jurisdiction is such that the proceeding could not be competent against any person whatsoever, the objection cannot be waived. Thus, no consent of parties (other, of course, than that embodied in a submission) could make the Sheriff Court judge in a question of heritable title, or entitle it to pronounce a decree of declarator, except in

<sup>(v)</sup> *Lyall v. Lanark Commissioners of Supply*, 5th July, 1859, 21 D. 1136. The objection, that the Sheriff was himself one of the Commissioners of Supply, was disregarded.

<sup>(w)</sup> *Kintore v. Lyon*, 27th Feb. 1802, M. 7673. See also *Lawson v. Magis-*

*trates of Edinburgh*, 28th Feb. 1581, M. 4811.

<sup>(x)</sup> *Robertson v. Panton*, 21st Nov. 1823, 2 S. 511.

<sup>(y)</sup> *Buchanan v. Keating*, 12th Dec. 1854, 17 D. 155.

so far as by law authorised otherwise to deal with those matters;(z) and where statutory forms must be complied with in order to give jurisdiction, consent of parties does not entitle the Court to judge where those forms had not been observed.(a) But where the proceeding is in itself a competent proceeding in the Sheriff Court, any objection which a defender could have taken, on the ground of his not being amenable to the jurisdiction, may be waived. In this way a foreigner, or a person resident in another county, may "prorogate" the jurisdiction of a Sheriff Court. This may be done either by express consent or by proceedings implying consent. Express consent may be embodied in a minute, which may be in general terms, and may even be written before the action is raised. Thus, a person may bind himself not to object to the jurisdiction of a particular Sheriff Court in regard to all the actions that might be raised against him about some specified matter.(b) Consent to the jurisdiction is implied by the mere act of appearing and pleading without stating any objection to it.(c) Even a party who appeared only to state certain objections to the competency of proceedings was held to have waived the objection to jurisdiction because he did not state it till after he had been defeated in a litigation about the other objections.(d)

(z) *Wylie v. Heritable Securities Investment Association*, 22nd Dec. 1871, 10 M. 253, contains much argument on this subject.

(a) *Erak. i. 2. 30*; *Forrest v. Harvey*, 25th April, 1845, 4 Bell's Appeal Cases, 197. In this case, a warrant of citation to appear before justices had been signed by a town clerk instead of a justice of peace clerk, and the whole proceedings were held null.

(b) *Longmuir v. Longmuir*, 21st May,

1850, 12 D. 926.

(c) *Service v. Chalmers*, 23rd Feb. 1627, M. 7305. *Erakine* (Pr. i. 2. 17) thinks the prorogation effectual in this case only if the defender have been cited in the territory, but the reason of this is not apparent, and the case he cites, which is that quoted in this note, does not bear it out.

(d) *White v. Spottiswood*, 30th June, 1846, 8 D. 952.

**11. Of Reconvening Parties.**—Reconvention is the name given to the ground upon which a person who has applied to a court as pursuer or complainer in any action subjects himself as defender to the jurisdiction in all relative proceedings. It has been said that this jurisdiction is founded on implied consent, and it has been therefore called a kind of prorogated jurisdiction; but it is better at once to say that it is a kind of jurisdiction founded in reason and equity, in order to protect a native defender from the disadvantage to which he might otherwise be put in dealing with a foreign pursuer, by not being able to take any counter proceeding. Difficulty has been felt in defining the extent of this jurisdiction. On the one hand, it has been said that a foreigner who applies to our courts renders himself responsible to every action which the person whom he has sued may think fit to raise against him, whether it be connected with the subject-matter of the first action or not. On the other hand, it has been attempted to narrow the jurisdiction so as to make the foreign pursuer liable only in counter actions, strictly so called. Neither of these extreme views is to be taken as correct. The great object of the jurisdiction is to protect the native defender against such disadvantage in dealing with the foreign pursuer as he would not feel in the case of a native pursuer; and the Court must keep this in view. On this ground, it is held that the jurisdiction exists where the claims are either *in eodem negotio* or *ejusdem generis*. Thus, a foreign pursuer raising an action for debt in our Courts will render himself liable to other actions of debt at the instance of the defender, though they may arise out of different transactions, but he will be liable to actions of damages only when they arise out of the same transaction, or out of some other transaction in the same course of dealing. A foreign pursuer raising an action of debt here will not render

himself liable to an action of damages arising out of an entirely different transaction.(e)

The action said to ground jurisdiction by reconvention may be of any kind by which the payment of money or the performance of an obligation is sought to be enforced. Thus a claim lodged in a mercantile sequestration is sufficient ground to justify an ordinary action being brought by way of reconvention.(f) The first action must be in dependence at the time the other action is brought. If the first action have been concluded, and the foreigner be no longer before our courts, it is too late to bring the counter action.(g) But the action is in time though the merits of the first action may have been disposed of, if it still be in Court on the question of expenses. Thus, a foreigner who had raised and lost an action before the Court of Session was held to be within the jurisdiction whilst the expenses were being audited, and he was made to answer to an action of damages for the oppressive use of arrestments on the dependence of the original action.(h) In ordinary circumstances, the application of the foreigner clearly must precede the application of the native, otherwise there can be no jurisdiction; but if a native first raises an action against a foreigner, and the foreigner, without waiting to state any objection to the jurisdiction, immediately raises a counter action, he will be foreclosed from stating it.(i)

(e) *Thompson v. Whitehead*, 25th Jan. 1862, 24 D. 331.

(f) *Barr v. Smith*, 18th Nov. 1879, 7 R. 247.

(g) *M'Ewan's Trustees v. Robertson*, 9th March, 1852, 15 D. 265; *Longworth v. Yelverton*, 5th Nov. 1868, 7 M. 70.

(h) *Baillie v. Hume*, 17th Dec. 1852, 15 D. 267. In *Black & Knox v. Ellis & Sons*, 7th June, 1805, M. (Appx. 1,

Foreign No. 7.) the jurisdiction was held to continue after the extracting of the decree and after payment, the money being still in Scotland; but this case is doubtful. The jurisdiction might continue after decree if the foreigner were making use of the Scotch Courts to enforce it.

(i) *Morrison v. Massa*, 8th Dec. 1866, 5 Macph. 130.

The rules as to reconvention have been developed in the Supreme Court, and there are no decisions expressly deciding that they are applicable to the Sheriff Courts. It is here necessary to distinguish between two sets of persons liable to be reconvened,—between foreigners not resident in Scotland and persons resident in Scotland but not in the particular sheriffdom. In the case of foreigners the principles will apply exactly and the practice is to sustain the jurisdiction by reconvention.(j) In the case of persons resident in other sheriffdoms, the principles do not apply to their full extent. They apply only to the extent of sanctioning counter actions arising out of the same facts. Except in the way of making one inquiry serve, there is nothing to be gained by reconvening such parties, because it is no hardship to make a man sue in one Sheriff Court instead of in another.(k)

(j) *Barr v. Smith*, *supra*, note (f), was a Sheriff Court appeal, but the objection that reconvention was not competent in the lower Court was not taken. See also Lord Deas' opinion in *Thompson v. Whitehead*, *supra*, note (e). There is no difficulty about citing the foreigner, because it is enough to serve the process on his procurator; *Vans v. Sandilands*, 18th Nov. 1765, M. 4840.

(k) In *Goodwin v. Purfield*, 8th Dec. 1871, 10 M. 214, it may be added, the Court of Session proceeded on the footing that reconvention as against foreigners applied in the Sheriff Courts. In the Sheriff Court of Renfrew it was held (in an instructive judgment) that it did; *Stewart v. Jarvie*, 1873, xvii. *Journal of Jurisprudence*, 607. The same has more than once been held in the Sheriff Court of Aberdeen.



CHAPTER V.

OF DECLINING THE SHERIFF'S JURISDICTION.

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| <p>1. <i>Declinature on Relationship.</i><br/>                 2. <i>Declinature on Interest.</i></p> | <p>3. <i>Declinature cannot be waived by the Parties.</i></p> |
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IN some cases, though the Court has jurisdiction, objection may be taken to the acting of some particular Sheriff. This is called proponing a declinature; and there are two grounds upon which it may be done, that of relationship to one of the parties, and that of interest in the matter at issue.

**1. Declinature on ground of Relationship.**—Declinature upon the ground of relationship depends upon statute. The Act 1594, c. 216, made it incompetent for any judge of the Court of Session to sit or vote in any action in which a father or brother or son might be pursuer or defender. The Act 1681, c. 13, besides extending the preceding Act to all Courts, extended the degrees forbidden by it to those of affinity, and added (as degrees which were to exclude) those of uncle and nephew by consanguinity. These statutes enumerate all to whom objection can be taken on the ground of relationship. Attempts to extend the degrees by implication have been discountenanced. Thus, it is no ground of declinature that the judge's wife is sister to the defender's wife,<sup>(a)</sup> or that the judge's niece<sup>(b)</sup> or

<sup>(a)</sup> Goldie v. Hamilton, 16th Feb. 1816, F.C.

<sup>(b)</sup> Erskine v. Drummond, 28th June, 1787, M. 2418.

grand-niece (c) is married to one of the parties. These decisions were pronounced upon the ground that the second part of the Act of 1681, excluding uncles and nephews, did not exclude uncles and nephews by affinity. It is not necessary that the relationship should be to the proper pursuer or defender. It is sufficient if it be to any party immediately and directly interested in the suit. Thus the brother-in-law of a mandatory (who is interested in the expenses) must be declined.(d) For the same reason, a father-in-law was excluded in a case in which his son-in-law was substitute heir to the claimant of an entailed estate, the right to which was in dispute.(e) And the statute applies though the relative may be suing in some capacity in which he has no personal interest. Thus, where a pursuer was suing for behoof of a statutory Board of Commissioners, his brother was declined, even though the defenders made it clear that he had no personal interest, by disclaiming all purpose of holding him personally liable for expenses.(f)

**2. Declinature on the ground of Interest.**—The objection, that a judge is interested in the matter at issue, does not depend upon statute; and there is occasionally considerable difficulty in ascertaining when the interest is of such a character that the objection ought to be held good or is so shadowy that it may be waived, and the Court have held themselves in judging of such objections, at liberty to take into view the convenience or inconvenience of sustaining them in the particular case. The interest need not always be

(c) *Gordon v. Gordon's Trustees*, 2nd March, 1866, 4 Macph. 501.

(d) *Campbell v. Campbell*, 26th June, 1866, 4 Macph. 867.

(e) *Shaw Stewart v. Porterfield*, (O. E.) 10, 15th May, 1821, 1 S. 6.

(f) *Highland Road Commissioners v. Machray*, 25th June, 1858, 20 D. 1165.

pecuniary. For example, if the judge be required as a witness in the cause, he may be declined (*g*) This, perhaps, proceeds rather on the ground of inconvenience to the parties than on the supposed interest of the judge. The rule, however, has a wider application. It is not, indeed, now held that a judge is disqualified by having once been counsel in the cause; (*h*) but, he is still held to be disqualified wherever his interest is of such a kind as reasonably leads to the supposition that he may not proceed to his duty with an unbiassed mind. Thus, if the judge be trustee for one of the parties, under a private trust, he is taken to be so much interested in it as to be disqualified. (*i*) But it is not enough to disqualify him that he is one of a numerous body of statutory trustees, (*j*) or still less that he is one of so large a body as the Commissioners of Supply. (*k*) Being interested as a proprietor in one of the parishes concerned, was held not to disqualify a judge to decide a question of a pauper's settlement; but this proceeded in part on the ground that the parish was large, and that the disqualification, if sustained, would have applied to nearly the whole bench. (*l*) By statute, it has now been settled that such a disqualification does not at all affect a judge of the Supreme Court. (*m*) It is sufficient for a judge to decline that he is a shareholder or partner (not merely as trustee, (*n*) but in his own right) in a joint-stock company which is pursuing or

(*g*) *Clark v. Wardlaw*, 15th Jan. 1845, 7 D. 268.

(*h*) *King v. King*, 27th Nov. 1841, 4 D. 124.

(*i*) *Martin v. Heritors of Kirkcaldy*, 23rd Jan. 1840, 15 F. 379.

(*j*) *Blair v. Sampson*, 26th Jan. 1814, F. C. (App. to vol. 18, 501). Many statutes, such as the Roads and Bridges Act of 1878, contain clauses providing

that the being of a trustee under them is not to disqualify the Sheriff.

(*k*) *The Lord Advocate v. Edinburgh Commissioners of Supply*, 5th June, 1861, 23 D. 933; *Lyll v. Lanark Commissioners*, *supra* p. 72, note (*v*).

(*l*) *Gray v. Fowlie*, 5th March, 1847, 9 D. 811.

(*m*) 40 Vict. c. 11.

(*n*) 31 & 32 Vict. c. 100, § 103.

defending;(o) though in a case where the pecuniary interest of each judge was small and remote, and where sustaining the objection disqualified nearly half the court, the objection was very reluctantly sustained.(p) This was a case where the judges were interested as partners of a life insurance company, and to prevent the recurrence of such difficulties, it has been enacted that it is not to be deemed a ground of declinature that a judge is a partner of any joint-stock company carrying on as its sole or principal business the business of life and fire or life assurance.(q) Where the interest is contingent and indirect, such as that if the defender's title be held bad, the judge's own title to an adjoining property may be challenged,—the declinature is repelled.(r)

**3. Declinature cannot be waived.**—When there is a good ground for declinature it cannot be waived by the parties. In the case of relationship, the objection depends on statute, and the whole proceedings, if it be neglected, are under a statutory nullity. At whatever stage the objection may be discovered it must be sustained, and the action commenced anew before another judge.(s) On public grounds the same rule is to be followed where the judge has a disqualifying interest in the suit. Parties are generally so unwilling to state a personal objection to a judge, and it would be so bad an example to allow a judge to decide a question in which he had a pecuniary interest simply because the parties were silent, that no option is left. It is the duty of the judge himself to state the objec-

(o) *Aberdeen Town and County Bank v. The Scottish Equitable Insurance Company*, 3rd Dec. 1859, 22 D. 162; *Wanchope v. North British Railway*, 17th Dec. 1863, 2 Macph. 333-4.

(p) *Borthwick v. Scottish Widows Fund*, 4th Feb. 1864, 2 Macph. 595.

(q) 31 & 32 Vict. c. 100, § 103. Being a director, would apparently still disqualify.

(r) *Belfrage v. Davidson's Trustees*, 20th June, 1862, 24 D. 1132.

(s) *Ommanny v. Smith*, 13th Feb. 1851, 13 D. 673.

tion ; and in most cases this is the way in which the point arises. In the Court of Session it is for the other Judges to say whether the grounds of the declinature are good. In the Sheriff Court, if the ordinary Sheriff-Substitute decline, the case may be proceeded with by one of the honorary Sheriffs-Substitute, or, if there be none who can act, by the principal Sheriff. In this case, however, it would probably be in the power of the principal Sheriff to review the grounds of declinature, and to remit to the Sheriff-Substitute to proceed. If the principal be disqualified, the Sheriff-Substitute may, notwithstanding, act ;(t) but the parties lose the benefit of the right of appeal. Should such a case occur as that all the Judges of the Sheriff Court were to decline, the party wishing to proceed might appeal,(u) and the Court of Session would have to decide what course should be followed.

(t) *Wallace v. Colquhoun*, 21st Jan. 1823 ; 2 S. 139 ; 1579, c. 84.

(u) The Act 1555, c. 39, providing that no advocacy of causes be taken

from the Judge Ordinary, excepts the case of the Sheriff-Principal or the Judge Ordinary being a party.

**PART II.**  
**OF THE SHERIFF'S ORDINARY COURT, AND**  
**OF THE ORDINARY ACTION.**

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**CHAPTER I.**  
**OF THE BUSINESS AND SITTINGS OF THE**  
**ORDINARY COURT.**

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| <ul style="list-style-type: none"><li>1. <i>Business of Ordinary Court.</i></li><li>2. <i>Ordinary Actions.</i></li><li>3. <i>Special Actions.</i></li><li>4. <i>General Regulating Acts.</i></li></ul> | <ul style="list-style-type: none"><li>5. <i>Sittings of Ordinary Court.</i></li><li>6. <i>Rolls of Court and Minute-Books.</i></li><li>7. <i>Processes and Pleadings.</i></li><li>8. <i>Interlocutor Sheets.</i></li></ul> |
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**1. Business of Ordinary Court.**—In ordinary language men speak of the different civil “Courts” held by the Sheriff—of the Ordinary Court, the Small-Debt Court, and the Debt Recovery Court. The language is not strictly correct. The Ordinary, Small-Debt, and Debt Recovery Courts are not three separate courts: properly speaking they are three branches of one court; but as they have separate records, separate modes of procedure, and (in most cases) separate times of sitting, the popular distinction is practically the most convenient, and it has of late found its way into the statutes.<sup>(a)</sup> It will therefore be followed here.

(a) 39 & 40 Vict. c. 70, § 2.

The business of the Ordinary Court is best described by saying that it comprises all the judicial business which is not specially appropriated to the other Courts; and as the Small Debt Court is concerned only with actions for sums not exceeding the amount of £12, and the Debt Recovery Court only with actions for debts not exceeding £50, and falling under the triennial limitation; it will be seen that the business of the Ordinary Court is of a very extensive and varied character.

The proceedings may be conveniently divided into two great classes, the first being devoted to the form of action ordinarily followed, and the second comprising all special forms of action.

**2. Ordinary Action.**—Under the first class will be taken the ordinary petitory action concluding for payment of a sum of money, which, for shortness, will be called the Ordinary Action. With respect to it, both those normal proceedings taken in almost every suit, and those incidental proceedings which special circumstances frequently require, will be considered. It will be convenient to take all these, firstly, on the footing that the causes are allowed to proceed to final judgment before the Sheriff-Substitute; and then to consider what remedy there is by way of appeal to the principal Sheriff. The consideration of what execution against the debtor's person or goods may follow on a decree in an ordinary action will complete this part of the subject.

**3. Special Actions.**—Having thus described, as thoroughly as may be, the proceedings in the Ordinary Action, the second class of actions will be taken, and under it will be considered all special forms of action with the exception of those relating to succession, which will form a subsequent and

separate part. Under special actions will be considered how far actions *ad facta præstanda* differ from actions with money conclusions, and what peculiarities must be attended to in all those different forms of proceedings which ask for special remedies or proceed under special statutes. In this class, too, will find their place all those actions, such as declarators or actions of count and reckoning and multiplepounding, which, though they may possibly concern money, do not ask for a simple order for payment, but for some more complicated remedy.

**4. General Regulating Acts.**—The principal general regulations in regard to proceedings in the Ordinary Court are contained in the Act of 1876.(b) Some things, however, are still regulated by the Act of 1853,(c) and many details, indeed, are still regulated by the Act of Sederunt of 10th July, 1839, which is in observance in so far as not altered by the subsequent Acts. The Act of Sederunt was passed after the Act of 1838(d) had effected various reforms, and was framed by remodelling (so as to bring into harmony with them) the regulations which had been made by the Act of Sederunt of 1825. Besides these general regulations there are many Acts of Parliament and Acts of Sederunt regulating special points or proceedings which cannot be noticed here.

**5. Sittings of Ordinary Court.**—Each Sheriff Court has two sessions in the year, the winter and the summer. The winter session commences on the 1st of October, or the first ordinary court-day thereafter, and ends on the last ordinary court-day in March. The summer session commences on the

(b) 39 & 40 Vict. c. 70.

(d) 1 & 2 Vict. c. 119.

(c) 16 & 17 Vict. c. 80.



first day of May, or first ordinary court-day thereafter, and ends on the last ordinary court-day in July. At Christmas time the Sheriff Court adjourns for a period of fifteen days, of which the last week of the ending, and the first week of the commencing year usually form part.(e)

During session, each Sheriff Court (excepting courts held at places where a salaried Sheriff-Substitute does not reside) sits for the despatch of ordinary civil business for such number of days in each week as may be fixed by each Sheriff by a Regulation of Court to be approved of by the Lord President and Lord Justice-Clerk. If these days be insufficient, the Sheriff must from time to time appoint additional court-days for the purpose of disposing of any arrears.(f)

Before the termination of the session the Sheriff must also appoint at least one court-day during the spring vacation for the despatch of civil business, and two courts during the autumn vacation for the same purpose.(g) Before the Act of 1853 it was not competent for the Sheriff to sign certain of his interlocutors during vacation, but now all such restrictions have been removed, and the Sheriff may pronounce orders of all kinds as freely during vacation as during session.(h)

**6. Rolls and Minute-Books.**—The practice of the different courts varies, but it is believed that in general at least two books are kept of the proceedings of the ordinary court—a motion roll and a minute-book. In the former are entered for each court-day all the causes which are to be called that day. These may be enrolled either by order of the Sheriff,

(e) 39 & 40 Vict. c. 70, § 4.

(f) 16 & 17 Vict. c. 80, § 42.

(g) 39 & 40 Vict. c. 70, § 5.

(h) 16 & 17 Vict. c. 80, §§ 44, 45, and 47.

or by the Sheriff-Clerk in the course of his official duty, or by the Sheriff-Clerk on the motion of either party. In the two former cases there are no special regulations as to notice of enrolment, but the Sheriff must take care not to put either party to disadvantage. When the cause is enrolled by one of the parties, the notice to be given is fixed by regulation or usage in each court, but in general the party must give to the clerk and to the opposite party forty-eight hours' notice of the enrolment of an ordinary action, and twenty-four hours' notice in the case of an action requiring extraordinary despatch. The notice must be in writing, and must be delivered at the office of the opposite agent, or posted to him. The notice specifies the purpose of the enrolment; which sometimes is inserted also in the motion roll. For convenience, the motion roll may be classified; keeping new causes, causes for closing records, or other causes, by themselves; and sometimes copies of it are printed and issued to the agents. The roll usually contains a space on which the clerk makes a jotting of the judge's deliverance, to be afterwards extended and signed.

The minute-book (or "diet-book") usually contains a memorandum of all important proceedings not appearing on the motion roll—such as short references to interlocutors pronounced by the Sheriffs, orders by them for regulating the business, memoranda of appearances entered, proofs taken, papers lodged, and other steps in processes. In some courts the commendable practice is followed of having a separate book for minuting all decrees. There is also kept in some places a book which is very convenient for the agents, namely, a register of all appearances which have been entered.

#### **7. Processes and Pleadings.**—The petitions, defences, and

the other various pleadings, and productions, as they are lodged, are inventoried, and then are kept together and form the processes. In the Ordinary Court, the rule is that while the pleadings are, in so far as they deal with fact, either written or printed,(i) all argument is oral; but in some exceptional cases there is still power to order an argument to be put in writing. The processes while current may be borrowed by agents practising within the sheriffdom, and the agents are liable to pecuniary penalties(j) and to "captions"(k) if they fail duly to return them. If any of the pleadings are lost or destroyed, a copy proved and authenticated to the satisfaction of the Sheriff may be substituted.(l)

**8. Interlocutor Sheets.**—The original orders themselves are written on what is called the interlocutor sheet—a paper put up with every cause, and reserved for orders by the judge, or matters specially appointed by statute to be put into it.(m) It never was the practice in the Sheriff Court to write the judge's orders in the minutes of the Court. The present practice, however, is somewhat different from the old, under which incidental orders were written on the proceedings to which they referred, and only important orders on the interlocutor sheet. Great care requires to be taken of the interlocutor sheet, because if it be lost it cannot be replaced as if it were a lost pleading,(n) and, if there be remedy at all, there seems to be none short of a proving of the tenor.

(i) 39 & 40 Vict. c. 70, § 7.

(j) *Ibid.* § 21.

(k) *Infra*, chap. iii.

(l) 39 & 40 Vict. c. 70, § 11.

(m) A. S., 10th July, 1839, § 162.

(n) *Cofton v. Cofton*, 18th March, 1875, 2 R. 599. The case was under the Court of Session Act of 1868, but its terms are exactly the same as the Sheriff Court Enactment.

## CHAPTER II

## ORDINARY ACTION—NORMAL PROCEEDINGS.

## SECTIONS

- |  |  |
|--|--|
| I. THE PETITION.                       | VII. REVISING, AMENDING, AND CLOSING RECORD.                       |
| II. THE CITATION.                      | VIII. PETITIONING AND RECOVERING DOCUMENTS FORWARDED ON IN RECORD. |
| III. ENTERING APPEARANCE.              | IX. THE PROOF.   |
| IV. DEFENDER IN ABSENCE AND RE-POSING. | X. THE DEBATE AND JUDGMENT.  |
| V. PROTESTATION FOR NOT EXISTING.      | XI. EXPENSES.  |
| VI. DEFENDER.                          |  |

THE normal proceedings in the action which requires to be used to enforce the payment of a sum of money exceeding £50 in amount, and which may be used (under certain restrictions as to expenses) for all amounts, will form the subject of the present chapter. The petition by which the defender is to be brought into court will be considered in the first section. The second will treat of the mode of serving the writ; and the third of the mode in which the defender enters appearance to defend. The fourth section will consider what the pursuer may do if the defender fail to enter appearance when first called on, and what subsequent opportunity the defender has for supplying the omission. Next, supposing the defender to have entered appearance, and that the pursuer is unwilling to proceed, the fifth section will explain the defender's remedy. The sixth and seventh sections will explain how the record of the parties' written pleadings is to be framed. As any documents referred

to in the pleadings ought to be before the court, the eighth section will explain what opportunity a party has of tendering them or of enforcing their production. The ninth section will assume that the parties—one or other—require to submit evidence to the court, and will show how the proof is to be taken. In the tenth section the debate and the decision will be considered; and a section devoted to the question of expenses will conclude the view of the ordinary course which is run by the great majority of actions. The various interruptions to which that course is subject will, according to the plan of the work, be treated of in the following chapter.

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#### Section I.—OF THE PETITION.

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|--------------------------------------|---|
| 1. <i>The Introduction.</i>          | 7. <i>Warrant to Cite.</i>              |
| 2. <i>The Pursuer's Designation.</i> | 8. <i>Inducia.</i>                      |
| 3. <i>Defender's Designation.</i>    | 9. <i>Authentication of Petition.</i>   |
| 4. <i>The Prayer.</i>                | 10. <i>Authentication of Warrant.</i>   |
| 5. <i>Condescendence.</i>            | 11. <i>Petition not to be borrowed.</i> |
| 6. <i>Note of Pleas in Law.</i>      |   |

The form of Petition in the ordinary action is given in a Schedule to the Act of 1876. The petition, taken in detail, consists of the following parts—(1) the introduction; (2) the name and designation of the pursuer; (3) the name and designation of the defender; (4) the prayer, embracing a demand for the amount claimed, and a demand for expenses; (5) a “condescendence” or articulate statement of the facts forming the grounds of action; (6) a note of the pursuer’s pleas in law; and (7) a warrant to cite the defender, containing a certification that he will “be held confessed” if he do not appear, and — if the pursuer desires it — a precept to arrest on the

dependence. There may be appended any account referred to in the petition, and the whole must be duly authenticated.(a)

**1. The Introduction.**—The introduction requires no notice. It simply gives the name of the sheriffdom, in which the action is raised, and the name of the place where the courts are held, at which it is proposed that the action should be conducted.

**2. The Pursuer's Designation.**—The pursuer is set forth by name and by designation, and wherever he sues in any special character,—as trustee, or inspector, or otherwise—what it is must be stated. The designation need not be that by which he is generally known; it is enough if it serve to point him out, and be correct as applicable to him at the time. Thus, a barrister-at-law was thought to have sufficiently designed himself by saying that he resided at a particular place, although he did not give his usual designation, and though he had resided at the place just long enough to found a jurisdiction as against himself.(b)

The number of pursuers who may sue in one action is not limited, provided they have a community of interest. Thus, two persons who have been injured by the same accident, or who complain of the same slander, may sue for damages in the same petition, provided always that there be separate conclusions for the damages payable to each.(c) These are extreme examples of what is to be taken as community of interest: the pursuers there have nothing more in common than an interest to save expenses by making one trial serve in place of two. If the acts of which two pursuers complain

(a) 39 & 40 Vict. c. 70, Sch. A.

(b) *Joel v. Gill*, 23rd Nov. 1859, 22 D. 6.

(c) *Revey v. Murdoch*, 11th March, 1857, 3 D. 888; *Harkes v. Mowat*, 4th March, 1862, 24 D. 701.

are different, it does not give them a community of interest that they have both been done by the same defender, because here nothing at all could be gained by having the matters mixed.(d) Indeed the practice of pursuers joining in one action where their interests are separable is in general inconvenient, and is not common.

Wherever parties sue, not as individuals, but in some special character, their title must be set forth. This is not only expressly required by the Act of 1876, but though it may appear to be simply a part of the description of the pursuer, it is also necessary because it really forms part of the grounds of action.(e) *Executors* are designed by setting forth their names and residences and the titles under which they act. They need not confirm to the debt till before extract; but their title, whether it be under testament or decree-dative, must be complete before proceedings are commenced.(f) It is preferable to set forth the names of all the acting executors, but in special circumstances action would be sustained at the instance of a majority.(g) *Trustees* are designed in like manner and there is no doubt that actions by them may be raised in name either of the quorum fixed by the deed, or, if there be no quorum, of the majority of those accepting.(h) A *pupil*, if he has no tutors, raises the action in his own name,(i) and when it comes into Court a curator *ad litem* is appointed. If a pupil have a tutor, as when his father is living, he cannot carry on an action in his own name. It does not

(d) *Gibson v. Macqueen*, 5th Dec. 1866, 5 Macph. 113.

(e) *Smith v. Stoddart*, 5th July, 1850, 12 D. 1185; *Anderson v. Duncan*, 9th Jan. 1861, 23 D. 258.

(f) *Malcolm v. Dick*, 8th Nov. 1866, 5 Macph. 18.

(g) *M'Laren on Wills*, vol. ii. p. 185.

(h) *Blisset's Trustees v. Hope's Trustees*, 7th Feb. 1854, 16 D. 482.

(i) *Fraser on Parent and Child* (edited by Cowan), p. 153. Inhibition and arrestment may be used in the pupil's name.

seem essential that the tutor's concurrence be set forth, though the proper form seems clearly to be that the tutor should not only be designed, but that he should raise the action as tutor, and conclude for payment to himself in that capacity.(j) A *minor* above puberty without curators sues in his own name, and after the action is brought, the Sheriff, if either party ask it, may appoint a curator *ad litem*.(k) If the minor have curators he ought to set them forth in the petition as consenting to the action, though doubtless the consent might be given afterwards.(l) A *married woman* sues in her own name, and her husband either concurs with her in suing, or when he refuses, and the case is one which she can sue without his consent, a curator *ad litem* may be appointed.(m)

When a company is pursuer it is necessary to make a very unmeaning distinction. If the company have what is called a "social" name,—that is, a name made up of that of persons, such as "Jones, Smith & Co.,"—it may sue and be sued by the name of the firm, with the addition always of such reference to its business and office as may serve to point it out. This holds though there be no one of the name of Jones or Smith in the company.(n) If, however, there be what is called a "descriptive" name,—that is, a name not consisting of surnames, such as the Aberdeen Gas Company,—the names of three partners of the company must be joined with it before it can sue.(o) Officials cannot sue in name of the

(j) *Fraser, ut supra.*

(k) *Mackay's Court of Session Practice*, vol. i. p. 313.

(l) *Fraser*, p. 378.

(m) *Horn v. Sanderson*, 9th Jan. 1872, 10 M. 295; *Wilkinson v. Bain*, 9th Nov. 1880, 8 R. 72. Much of the authority of the older cases is indirectly abrogated by the Married Women's

Property Acts of 1881 and 1877.

(n) *Wilson v. Ewing*, 20th Jan. 1836, 14 S. 262; *Thomson v. Johnstone*, 30th Nov. 1836, 15 S. 173, and other authorities cited in *Clark on Partnership*, vol. i. p. 542.

(o) *London and Edinburgh Shipping Co.*, 19th June, 1841, 8 D. 1045, *Clark on Partnership*, vol. i. p. 540.



company. Banking companies sue in a particular manner, by their firm and the addition of a registered officer. This is regulated by a special Act of Parliament.<sup>(p)</sup> Companies incorporated under the Companies Act, 1862, sue in the manner specially provided by it, that is, as corporations in their corporate names.<sup>(q)</sup> Wherever there are special incorporating Acts, these ought to be consulted before framing the petition.

**3. Defenders' Designation.** — The defenders must be designed in the same way as the pursuers. Care must be taken to give their names and residences as accurately as possible, though trifling inaccuracies of an excusable kind, where there is no doubt about the person intended, will be disregarded. Thus, a defender whose name was William John Munro, but who sometimes signed William Munro, was not allowed to object to a summons in that style.<sup>(r)</sup> In another case, a widow, designed by her residence together with the name and designation of her deceased husband, was not allowed to object that a mistake had been made as to her maiden surname.<sup>(s)</sup> In a similar case, an objection founded on an error as to the christian name of a married woman was repelled.<sup>(t)</sup> In all such cases the principle is, that the designation is sufficient if there is no room for doubt as to the person intended. As the pursuer may often not have much knowledge of the defender's designation, it would be absurd to require anything more from him.

Although pursuers are not permitted to join together to

(p) 7 Geo. IV. c. 87.

(q) 25 & 26 Vict. c. 89, § 18.

(r) Guthrie v. Munro, 27th Feb. 1833,  
11 S. 465.

(s) Muir v. Hood, 10th July, 1845,  
7 D. 1009.

(t) Hagart v. Robertson, 20th Dec.  
1834, 13 S. 234.

sue on separate grounds of action, it is competent to include several defenders on separate grounds, provided the number of six be not exceeded.<sup>(u)</sup> This power, however, is very little used (except in actions of removing). It is the remains of a system under which the obtaining of a writ from the Sheriff was a more serious undertaking than at present, and when a pursuer was therefore anxious to include in it everybody against whom he had at the time any claim. The power is not suited to the present forms of pleading. There is no limit to the number of defenders who may be sued (on the same ground or grounds of action) as being liable jointly, or jointly and severally, according to the nature of the case.

If the defenders are sued in any special character, care must be taken to set that forth, and to do so accurately. If it be erroneously set forth, the action will be liable to be dismissed, even though it should appear that the defenders were liable in some other capacity. Thus, in a case where a person was sued as owner of a certain ship, the action was dismissed on its turning out that he had no share in it, although it was apparent that he was liable for the debt as having had the use and management of the vessel when it was contracted.<sup>(v)</sup> The example is probably one of the over anxious application of the rule, but the rule itself is necessary, and the reason is that when defenders are sued in any special capacity, such as that above mentioned, or that of

(u) A. S., 10th July, 1839, § 9. The limit does not apply to actions of multiplepinding, mails and duties, pinding of the ground, and forthcoming. It is hardly necessary to say that there must be conclusions capable of being applied separately to each defen-

der sued; *Barr v. Neilson*, 20th March, 1868, 6 M. 651.

(v) *Dempster v. Drybrough*, 28th Nov. 1837, 16 S. 109. Probably such a mistake would now be allowed to be amended.

executors, or trustees, the designation in so far truly forms part of the grounds of action.

Executors and trustees, when defenders, are designed in the same way as if they were pursuers. A summons against a pupil is directed not only against him, but also against his tutors *nominatim*, when they are known, or against tutors and curators generally, if he any has, when he has no known tutors.(w) An action against a minor must be directed also against his curators, naming them if they are known, and if not designing them generally; but the cases of minors and pupils differ in so far that if the guardians be omitted in the case of a minor they may be called afterwards in the course of the process, while in the case of a pupil they may not.(x) If the minor, whether under or over pupillarity, have a father living, it is enough to call the minor individually, and his father as curator-at-law.(y) Tutors and curators when not known are called edictally.(z) If no guardians should appear, it is essential in the case of a pupil, that a curator *ad litem* be appointed; and in the case of a minor above pupillarity, the same course is to be recommended, but is not, unless demanded by one of the parties, essential.(a) Against married women actions are directed by calling them, and their husbands for their interest.

Companies are sued in the same manner as they sue.

**4. The Prayer.**—The prayer begins by a reference to the condescendence and pleas in law which are to follow, and then prays the Court to grant a decree against the defender ordain-

(w) *E. of Craven v. Lord Elbank's Trustees*, 9th March, 1854, 16 D. 811; *Fraser, ut supra*, p. 161.

(x) *Thomson v. Livingston*, 14th Nov. 1863, 2 Macph. 114; *Fraser*, p. 379.

(y) 39 & 40 Vict. c. 70, § 12 (4).

(z) *Ibid.*

(a) *Cunningham v. Smith*, 8th Jan. 1880, 7 R. 424.

ing him to pay to the pursuer a sum of money which must be definitely stated. Payment may be demanded in one sum or by instalments, according to circumstances, and either at the present or a future day. Everything, however, must be definite. This rule was applied with some strictness in an action of damages, which was dismissed because the pursuers concluded for payment of a sum to be disposed of "in manner to be mentioned in the course of the process to follow hereon."(b) If it be intended that the defenders, where there are more than one, should be found liable jointly and severally, that must be specially concluded for, because otherwise the Court will have power only to find them liable jointly. Under the old practice the conclusion contained a reference to the grounds of action, but under the new practice there must be no statement of them in it.(c) There is occasionally some difficulty in complying with this requirement where different sums are claimed in one petition, but the pursuer must always use the utmost care to avoid the introduction into the prayer of anything like statement of fact.

Interest and expenses, if wanted, must be specially prayed for.(d) The law was always so with regard to interest. With regard to expenses, it was formerly in the power of the Court to give them though they were not asked ;(e) but after the distinct provision of the Act of 1876 on this point, this practice could not now be followed.

**5. Condescendence.**—After the prayer for payment of the sum, the petition contains a concise statement of the ground or grounds upon which it is demanded, stated articulately

(b) *Mackintosh v. M'Tavish*, 19th June, 1828, 6 S. 994.

(c) 39 & 40 Vict. c. 70, § 6.

(d) 39 & 40 Vict. c. 70, Sch. A. Note.

(e) *Heggie v. Stark*, 1st March, 1826, 4 S. 510; 1592 a. 144.

in what is called the Condescendence. The statement is one of fact only—all argument or comment being rigidly excluded—and it must be made succinctly and without quotation from documents except where indispensable. (f) The object should always be to set forth clearly every fact that is required and nothing more. Leaving the law to be noted afterwards, the Condescendence simply sets forth such facts as it is necessary for the petitioner to establish in order to show that the sum claimed is due.

In former times, there was a great deal of discussion as to the amount of fact which required to be set forth in the initial writ. The rule in use before the Act of 1853, as laid down by the Court, was that the summons (which then began the process) had to be perfect and complete *ab initio* in everything which was of the essence of the action, whether in the averment of what was an essential quality or of what was a proper ground of action. (g) This rule, not remarkable for its perspicuity, did not differ in substance from the terms of the Act of Sederunt of 1839, which required that the summons should contain a concise and accurate statement of the facts, and should set forth in explicit terms the nature, extent, and grounds of the complaint or cause of action, as well as the conclusions deduced therefrom. (h) The Act of 1853 so far altered these rules as to make it neither requisite nor proper for the summons to contain a statement of the facts in the detailed way in which they used to be given; but there was no dispensation from the necessity of stating the grounds of action. However briefly they might be stated, still they had to be there. (i) And this rule is still in force. The “grounds of action” must still be stated, though they must be stated succinctly.

(f) 39 & 40 Vict. c. 70, § 6.

(i) *Cameron v. Hamilton*, 1st Feb.

(g) *Dallas v. Mann*, 14th June, 1853, 1856, 18 D. 423; 16 & 17 Vict. c. 80, § 3.

(h) A. S., 10th July, 1839, § 10.

What is a complete statement of the grounds of action must depend greatly on the nature of the case. The character in which the pursuer sues has already been given, but his title to sue, that is, the fact which grounds his right to make the particular demand, must also of course always appear.(j) An action upon an account is completely libelled by referring to it by the date of its commencement and of its termination, setting forth that the defender incurred it, and annexing it. An action upon a bill or other written document or contract is libelled by setting forth the names of the parties to the document, with its date or dates, and briefly mentioning the obligation undertaken by it. If any fact such as notice of dishonour requires to be proved in order to make the defender liable on the document, the time and place of giving it, and the name of the holder at whose instance it was given should be set forth. Where the action is to be laid not only upon the contract, but upon the debt constituted by it, the latter should be specially set forth, as it forms a different ground of action. It is often difficult to distinguish between mere details of proof and what forms part of the grounds of action. Wherever some matter must invariably be proved or admitted before the pursuer can succeed in any action of the kind, the statement of that may be taken as forming part of the grounds of action, while the details as to how it came about in the individual case may be rejected. Thus, if it appeared that a slander was pronounced in such circumstances that the defender could in no case be made liable for it unless he spoke maliciously and without probable cause, the condescence must set forth malice and want of probable cause.(k) Where a sum is due in virtue of some special Act of Parliament, the

(j) *Kilmarnock Magistrates v. Mather*, 19th Feb. 1869, 7 M. 548.

(k) See *Cameron v. Hamilton*, *supra*, note (i).

Act must be set forth. This does not mean that Acts changing or adding to the common law must be recited. It applies to sums due to persons under Local and Personal Acts, and to penalties incurred under Public Acts,<sup>(l)</sup> though the preferable place for making any reference to a Public Act is in the Pleas in Law. It seems unnecessary (though advisable) to notice a continuing Act.<sup>(m)</sup>

It is impossible to go farther into this matter of setting forth the grounds of action, because to do so would be to go over every possible sort of claim. The pursuer must always take care that he sets forth enough both to make his petition relevant as it stands and to give him a basis for going afterwards into farther details if requisite. If the petition be incomplete, the pursuer must then take into consideration whether the requisite changes on, or additions to, the grounds of action may not be made in revising the condescendence, or in an amendment of the libel. He should get the opportunity of making them in one or other of these ways. The practice of sustaining the defence of want of relevancy or specification, without affording the pursuer an opportunity of meeting it, was always thoroughly bad,<sup>(n)</sup> and is now contrary to the terms of the Act of 1876.<sup>(o)</sup>

**6. Note of Pleas in Law.**—The petition contains a note of the pleas in law which the pursuer is to maintain. This note is meant to indicate the legal principles which, when taken along with the facts set forth in the condescendence, show the sum claimed to be due. There are few things more difficult

<sup>(l)</sup> Glasgow, Airdrie, &c., Railway  
v. Tennent, 7th Dec. 1848, 11 D. 212;  
Munro v. Munro, 31st Jan. 1845, 7 D.  
358.

1858, 20 D. 672.

<sup>(n)</sup> Manson v. Dundas, 13th Dec.  
1870, 9 Macph. 272.

<sup>(o)</sup> 39 & 40 Vict. c. 80, §§ 13 and 24.

<sup>(m)</sup> Rankine v. Brown, 24th Feb.

to do well than to make a plea in law. Abstract legal propositions, on the one hand, are not pleas in law. On the other hand, the error may be committed in the opposite direction. Thus, a note that, "in the circumstances set forth in the condescendence the pursuer is entitled to decree as asked, with expenses," is not a plea in law. Commenting on this form, the Lord President Inglis defined a plea in law as "a distinct legal proposition applicable to the facts of the case." The plea which the Court allowed to be substituted may be taken as a good example. It explains of itself the nature of the case, and was in these terms:—"The pursuers having been employed by the defender as shipbrokers to procure a charter of the defender's vessel, and having in respect of said employment performed the acts and rendered the services set forth in the condescendence, are entitled to decree in terms of the conclusions of the libel, with expenses."(*p*)

Each plea should be complete in itself, and each should set forth some ground in law on which the pursuer maintains that one or more of his conclusions should be granted; or, if there be a question as to the mode of proof, on which he maintains that proof of some kind is competent or incompetent, as the case may be. The multiplication of incomplete pleas in law, which advance the pursuer only a step towards his conclusion, is both inconvenient and confusing, and is liable to the objection of being argumentative. When the practitioner feels tempted towards this course it should be remembered that in very many cases there is not room for the pursuer having more than one plea in law.

**7. Warrant to Cite.**—The next portion of the initial writ is the direction to cite. This is in the form of an inter-

(*p*) *Young v. Graham*, 20th Nov. 1860, 23 D. 86.



locutor upon the petition. It grants warrant to cite the defender; and the manner in which he is to be cited, that is to say, whether edictally or in common form, should be set forth. It will be advisable also expressly to order service on the defender of a copy of the petition and deliverance, lest this necessary part of a citation should be omitted by the officer. The *induciæ* upon which the defender is to be cited, that is, the time which the defender is to be allowed to make up his mind whether he is to defend, must of course be stated in every case. The warrant next provides for his meaning to do so, and ordains the defender to lodge with the Clerk of Court a notice of appearance within the *induciæ*. The penalty for failure to do this is not stated more distinctly than—in very old language—as being the “certification of being held as confessed.” Lastly, the warrant is to contain any interim order which it may be proper to grant.(q)

8. *Induciæ*.—The Act of 1876 has a clause (§ 8) to regulate the period of *induciæ* on petitions. It says that petitions may proceed on seven days', or if the defender reside on an island or out of Scotland, on fourteen days' warning. These periods mean that the notice of appearance must be lodged on the seventh or fourteenth day after citation. The Act, however (§ 8, 1), says that where a shorter warning is in force at its passing it shall still be sufficient; and this will meet the case of its being competent under any special form of proceeding to give shorter warning. In the case of certain petitions, the Sheriff, before the Act, fixed such warning in each case as he thought proper. This power he may now exercise in any petition, the Act of 1876 saying (§ 8, 2) that he may shorten the *induciæ* as he shall see fit in any

case which he considers to require special despatch.(*r*) For edictal citations the *induciæ* are fourteen days ;(*s*)—except in the case of the tutors or curators of a minor, who are called edictally upon the same *induciæ* as the principal defender.(*t*)

**9. The Authentication of Petition.**—The only direction in regard to the authentication of the petition which is contained in the Act of 1876 is, that every writ shall be signed by the pursuer or his law-agent, who shall add his address.—(Sched. A, note.) This enactment will be complied with if the writ be signed once, in which case the proper place for the signature will be at the end of the note of pleas in law, and this has been decided to be sufficient ;(*u*) but if anyone should want to be very particular about forms, he may sign the prayer also. Annexed accounts need not be signed,(*v*) and it seems quite unnecessary to sign each page of the petition.

It was formerly held that as the whole summons which began the action was a writ of the Court, any erasure or other serious defect in an essential part of it would be fatal.(*w*) This, however, was subject to the exception that as the rules as to the authentication of the summons were not rules enacting new solemnities, but were mere expressions of the older practice, they were not to be taken as imperative, and therefore not to be applied so as to throw out the writ where they were substantially complied with, and where everything had been done requisite to show that the writ was authentic and unobjectionable in all essential points.(*x*) As under the new

(*r*) *Muir v. More Nisbet*, 3rd Nov. 1881, 19 S. L. R. 59.

(*s*) 39 & 40 Vict. c. 70, § 9.

(*t*) A. S., 1839, § 22.

(*u*) *Sharp v. M'Cowan*, 4th July, 1879, 6 R. 1208.

(*v*) *Cunningham v. Milroy*, 22nd March, 1865, 3 M. 733.

(*w*) *Taylor v. Malcolm*, 5th March, 1829, 7 S. 547.

(*x*) *Robinson v. Wittenberg*, 15th Dec. 1860, 23 D. 181.

practice, the warrant of citation is the only part which is even in form the writ of the Court, these rules do not now apply in precise terms, but they apply in substance. The warrant to cite adopts the previous petition, and as no petition on which a deliverance has been pronounced can be altered without the authority of the court, an erasure in it, which might leave it doubtful whether it had been altered before or after the deliverance, might be a very serious matter.

**10. Authentication of Warrant.**—The warrant must be authenticated by the signature of the Sheriff or Sheriff-Clerk. The Sheriff's signature is sufficient in every case. The Sheriff-Clerk's signature is sufficient for an order for citation (edictal or otherwise) containing nothing in addition except a warrant to arrest on the dependence.<sup>(y)</sup> It would seem that the Sheriff-Clerk may sign the warrant though the mode of citation or the *induciæ* should not be the ordinary ones, provided they be fixed by the operation of the law; but where the Sheriff has to apply his mind to the matter—for instance, where he shortens the period of *induciæ* as an act of discretion—it would seem that he ought to sign the warrant.—(Sched. A, note.)

**11. Petition not to be Borrowed.**—When the petition is lodged for calling, the Sheriff-Clerk cannot give it up again for any purpose without a special order from the Sheriff in writing. In defended causes provision is made for the lodging of a certified copy, which may be borrowed in place of the principal, and be used (when necessary) for arresting on the dependence.—(Act of 1876, § 10.)

(y) Arrestment on the dependence is treated in the following chapter.

## Section II.—OF THE CITATION.

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|--|---|
| 1. <i>How Service Made.</i>                      | 12. <i>Accepting Service.</i>                     |
| 2. <i>Non-postal Citation.</i>                   | 13. <i>Schedule of Citation and Service Copy.</i> |
| 3. <i>Personal Service.</i>                      | 14. <i>Execution of Citation.</i>                 |
| 4. <i>Service at Dwelling-house.</i>             | 15. <i>Defective Citation.</i>                    |
| 5. <i>Keyhole Service.</i>                       | 16. <i>Service by Postal Citation.</i>            |
| 6. <i>Service beyond Sheriffdom.</i>             | 17. <i>By whom Given.</i>                         |
| 7. <i>Time of Service.</i>                       | 18. <i>Letter of Citation—Contents.</i>           |
| 8. <i>Special Rules in Special Cases.</i>        | 19. <i>Letter of Citation—Address.</i>            |
| 9. <i>Edictal Citation—Foreigners.</i>           | 20. <i>Registration and Posting.</i>              |
| 10. <i>Edictal Citation—Tutors and Curators.</i> | 21. <i>Execution of Citation.</i>                 |
| 11. <i>Equivalents to Service not Admitted.</i>  | 22. <i>Effect of Postal Citation.</i>             |

**1. How Service Made.**—The petition, after the warrant upon it has been duly signed, is returned by the Sheriff-Clerk to the pursuer, in order to its being served upon the defender. This service is made in two ways, the one through delivery by an officer of court, which has hitherto been the only way competent, and the other through delivery by the post-office, which though newly introduced, and as yet optional, has been introduced in such a manner that it will likely become before long the only way.(a) As, however, the statute introducing the citation by post, assumes that the older mode of citation is understood, it is necessary to begin by explaining the latter. For convenience the two modes of citation will be distinguished as Postal and Non-postal.

**2. Non-postal Citation.**—When the citation is to be given in the manner in use before 1883, the petition is served on the defender by one of the sheriff-officers.(b) The service is

(a) 45 & 46 Vict. c. 77.

(b) It does not appear to be quite

clear whether an officer of the Court of Session (messenger-at-arms) may not

made in presence of a witness, (c) who must be a male above the age of fourteen. (d) The particular officer may be selected by the pursuer, but must not be interested in the suit. (e) The witness may or may not be connected with the officer. At the time of service the officer must have the original writ in his possession. If required, he must exhibit it to the defender; but he is not bound to exhibit it to any other party. (f) There are commonly three modes in which the officer (being duly provided with the writ and accompanied by the witness) may serve the petition. These three are—(1) personally; (2) at the dwelling-place when admittance is obtained; and (3) at the dwelling-place when admittance is not obtained.

**3. Personal Service.**—Personal Service may take place wherever the defender happens to be found,—in the street, or in a place of business, or elsewhere, as the case may be. It is the best of all kinds of service, as it saves all question as to whether the defender actually got notice, and as, in certain cases, it forms an element in support of the jurisdiction. The officer must tender to the defender a copy of the writ, along with a notice telling him when and where to appear, called the schedule of citation. The service is complete when this tender has been made, and cannot be defeated by the defender refusing to receive the documents. (g)

**4. Service at Dwelling-house.**—Service at the dwelling-

also effect the service (see *supra*, p. 50; *Cheyne v. M'Gungle*, 19th July, 1860, 22 D. 1490). As pointed out in Campbell on the Law of Citation, all the statutory forms are directed to officers of the Sheriff Court.

(c) 1 & 2 Vict. c. 119, § 23. Formerly two witnesses were required.

(d) *Davidson v. Charteris*, 12th Dec. 1732, M. 16,899.

(e) *Dalgleish v. Scott*, 18th June, 1822, 1 S. (O. E.) 506.

(f) *Lermont*, 11th July, 1699, M. 3096.

(g) *Stair*, iv. 38, 15. The fact of refusal ought to be mentioned in the execution.

house is not authorised unless the defenders cannot be personally apprehended; (*h*) but this provision has been too laxly interpreted, and in practice personal service is not insisted on wherever the officer has not seen the defender in going to look for him at his principal dwelling-place. Service at the dwelling-place begins by the officer making inquiry there for the defender. If the door is opened to him he must ask for the defender, and must make a point of seeing him if he is within, and admittance is not refused, or rendered impracticable by sickness. If he be refused admittance to see the defender, he is not to use force or threats to obtain it, but he must not stop for less than a refusal. A service was once held bad when the officer had desisted from attempting to see the defender on being told (in the morning) that he was not yet up. (*i*) If the defender be not in the house, or if admittance be refused or be impracticable, the officer may then leave the copy of the writ, with the schedule of citation, with the defender's wife, or with one of his servants. The fact of the person receiving the documents excludes inquiry into the fact whether he or she was a servant or not, the person having by receiving them acted in that capacity. (*j*) If the servants will not take the documents, they are affixed to the door.

In any question as to whether the place of service was or was not the defender's dwelling-place, the same rules apply as those formerly considered in regard to the question of what was to be taken as his dwelling-place, with a view to founding jurisdiction. (*k*)

(*h*) 1540, c. 75.

(*i*) *Bruce v. Hall*, 13th July, 1708, M. 3696. The defender was not living at his usual dwelling-place, which made the case against the service all the stronger.

(*j*) *A. v. B.*, 28th Jan. 1834, 12 S. 347.

(*k*) *Baillie v. Menzies*, 22nd Dec. 1710, M. 3704; *Calder v. Wood*, 19th Jan. 1798, M. App. "Execution" No. 1.

**5. Keyhole Service.**—When the officer cannot obtain admittance to the dwelling-house, his duty is to give six audible knocks, and then to affix the schedule and relative copy of the writ to the door. This is commonly done by stuffing them into the keyhole, from which this somewhat primitive mode of serving a writ has come to be known as a keyhole citation.<sup>(l)</sup>

**6. Service beyond Sherifffdom.**—The warrant is of itself in general authority for service within the sherifffdom only; but it is a simple matter to make it good for service in another sherifffdom. If a defender (who, it is presumed, is amenable to the jurisdiction) requires to be cited in another sherifffdom, the warrant is indorsed by the Sheriff-Clerk of that sherifffdom, and may then be served by an officer belonging to it. This proceeding was introduced in 1838,<sup>(m)</sup> and has superseded the old method, which was by using "Letters of Supplement," obtained from the Court of Session. The old theory was that the Sheriff's authority, under which the service nominally proceeded, was good only within his own sherifffdom, and that, before it could be made good in another jurisdiction, it required to be supplemented by the authority of the Supreme Court. The new practice is the form which has remained after the substance is gone, and has no other purpose than that of giving to the officer the assurance of a higher functionary than himself that the writ he is serving is the genuine writ of another sherifffdom.<sup>(n)</sup>

(l) In small-debt actions there are special rules for service when the house is shut, or the defender has removed. 34 & 35 Vict. c. 42.

(m) 1 & 2 Vict. c. 119, § 24.

(n) In some sherifffdoms (notwithstanding the precise words of the en-

actment just quoted, and of 33 & 34 Vict. c. 86, § 12) each of the counties of which the sherifffdom was formerly composed is still, for the purpose of service, treated by the Sheriff-Clerks and officers as if it formed a separate jurisdiction.

To a very limited extent, the necessity for having a warrant of citation indorsed for service in another sheriffdom has been abolished. It is made unnecessary in cases where the defender is subject to the jurisdiction under the Act of 1876—that is, under sections 46 and 47 of it already mentioned (o)—being those concerning persons carrying on business within the county, and concerning actions of furthcoming and multiplepoinding. In cases coming under these sections the writ may be served at the defender's domicile without being indorsed. (p)

**7. Time of Service.**—Service may be made at any *hour* of the day, or even of the night. At least, so it is said. (q) But great difficulty would now be felt in sustaining a service—more particularly if it were not a personal service—given at any extraordinary hour, unless under some special circumstances. The *day* on which citation is given must not be a Sunday. (r)

There does not appear to be any fixed period after the issue of the warrant on the petition within which the citation must be given. There is an Act of Sederunt saying that summonses are to be served within a year and a day “of the signeting,” but this expression plainly applies only to summonses in the Court of Session. (s) There is no similar rule with regard to the Sheriff Court; but as there is a very general understanding that there is, it would be very unadvisable to use proceedings on a warrant which had been longer issued.

(o) *Supra*, p. 75 and p. 79.

(p) 39 & 40 Vict. c. 70, § 12 (1).

(q) See Campbell on Citations, p. 65.

(r) *Oliphant v. Douglas*, 3rd Feb.

1663, M. 15,002.

(s) A. S., 8th July, 1831. It appears to have been intended that the provision should extend to the Sheriff Courts.



**8. Special Rules for Service in Special Cases.**—Service upon a company is given at their place of business. It may be done by giving the service copy and schedule to one of the partners, or to a clerk found there.<sup>(t)</sup> It is not, however, necessary that it should be at the principal place of business. It is sufficient if it be the branch at which the business in question has been conducted;<sup>(u)</sup> unless, indeed, where there be anything (which the pursuer ought to know) in the special contract of copartnery, or elsewhere, requiring citation to be given at the head-office. If individual partners are called along with the company, they must be cited in the same way as other individuals. Corporations are cited by delivering a copy to the preses when the body has met for deliberation, or by giving a copy to each of the office-bearers.<sup>(v)</sup> Railway and other statutory companies frequently have special clauses in their Acts of Parliament as to the mode of citation, and to these it is necessary to attend. Companies registered under the Companies Act, 1862, may, under that Act, be cited through the post, by sending the copy writ and schedule addressed to the company at their registered office.<sup>(w)</sup>

**9. Edictal Citation — Foreigners.**—There cannot be many cases in which the Sheriff has jurisdiction over persons “furth of Scotland;” and, of course, it is a truism that he must have the jurisdiction before he can issue his warrant to cite. If, however, he has jurisdiction, and does issue a warrant to cite a person furth of Scotland, provision is made for executing it. The Sheriff-Clerk must insert in the warrant authority to cite

(t) *Wordie v. M'Donald*, 15th Dec. 1831, 10 S. 142.

(u) *Young v. Livingstone*, 13th March, 1860, 22 D. 983.

(v) *Per curiam* in *Dalrymple v. Ber-*

*tram*, 23rd June, 1762, M. 752.

(w) 25 & 26 Vict. c. 89, § 62. The special rules for service in special actions will be considered in connection with them.

edictally, and, as already pointed out, the *induciæ* must be fourteen days.

The edictal citation itself is an empty ceremony. A copy of the warrant of citation is delivered at the office of the Keeper of Edictal Citations at Edinburgh, according to the mode established for Court of Session citations. If the pursuer prefer it, he may send a registered post letter containing a certified copy of the warrant to the Keeper. An abstract of the particulars appears afterwards in print called the Register of Edictal Citations. But as these things do not inform the defender, the Act of 1876 provides that, where he has a known residence or place of business in England or Ireland, he shall get a copy of the petition and citation (on the fourteen days' *induciæ* always) posted to him by the officer in a registered letter.(x)

**10. Edictal Citation — Tutors and Curators.**—The tutors and curators of a minor, if they are not known to the pursuer, may now be cited edictally, the old manner of citing them at the market-cross being abolished. The manner of citing such persons edictally is not specified, but it ought to be sufficient if the rules for citing persons furth of Scotland are followed.(y) The *induciæ* are, as already pointed out, the same as for the principal defender.

**11. Equivalent to Service not Admitted.**—The requisites of citation being statutory, they must be literally obeyed, unless the defender agree to waive them. Thus, things that are equivalent, or which might even be supposed to be better than the statutory regulations, will not be admitted. It will not, for example, be sufficient citation to give the service copy

(x) 39 & 40 Vict. c. 70, § 9.

(y) *Ibid.* § 12 (4).

and schedule to the wife when not in her husband's house,(z) or to a partner of a company found upon the street, or to leave them for an individual at his shop or counting-house instead of his dwelling-place,(a) though all these things might be thought more rational than some of the modes of service which are recognised.

**12. Accepting Service.**—The defender may, however, dispense with citation altogether. This is done by writing on the summons what is called an acceptance of service, which simply says that service of the summons is accepted by the defender. It is signed by him or his agent. In the Court of Session it is customary for an agent accepting service to produce a mandate specially authorising him to do so. This rule is not acted on in the Sheriff Court; though, of course, a mandate would have to be produced were the pursuer to ask for it.

**13. Schedule of Citation and Service Copy.**—The schedule of citation is the partly written and partly printed document which the officer delivers to or leaves for the defender. In form it is a memorandum of the message which the officer is supposed to deliver verbally to him.(b) It is signed by the officer only. Along with this, in all ordinary actions, the officer delivers a copy of the petition, signed by him on each page.(c) The name of the pursuer's procurator must be marked on the back of the copy and on the schedule.(d) If there be more defenders than one, each

(z) *Cassils v. Roxburgh*, 11th Dec. 1879, M. 3695.

(a) *Sharp v. Garden*, 21st Feb. 1822, 1 S. (O. E.) 337.

(b) The Act of 1858 shortened the form of the execution returned to the

court, but the schedule of citation left with the defender remains in the form previously in use.

(c) A. S., 10th July, 1839, § 13.

(d) *Ibid.* § 19.

gets a schedule of citation, and a copy either of the whole petition or of so much of it as concerns himself. It is not necessary in the ordinary court to serve copies of accounts referred to in the petition.(e)

**14. Execution of Citation.**—The execution of citation is the docquet which the officer annexes to the petition after service.(f) It must set forth the mode in which the citation has been given, whether personally or whether at the dwelling-place, with or without access.(g) It is not usual, however, to set this forth in detail, as, for example, to give the name of a servant with whom the copy was left. The execution is signed by the officer and the witness. When complete it is held to be *prima facie* evidence of the truth of what it sets forth; and so far is this rule carried that in a Court of Session action it is not competent to challenge the execution of citation on any ground not patent on examining it, without bringing an action to reduce it.(h) In the Sheriff-Court, where actions of reduction are unknown, the challenge may be made by what are called “articles of improbation,” for which special provision is made.(i) These, of course, are unnecessary, where the ground of objection is patent. Although the defender is thus restricted in attacking the execution, the pursuer is left at liberty to have it amended. If the service itself has been all in order the officer may write out a new execution in proper form on its turning out that the first one has been defective.

(e) *Cunningham v. Milroy*, 22nd March, 1865, 3 M. 733.

(f) It must be written at the end of the petition, after the deliverance, or on “continuous sheets,” and not on a separate paper. Anybody doubting about what is a “continuous sheet”

may consult *Kennedy v. Murphy*, 10th Dec. 1863, 2 Macph. 232.

(g) A. S., 10th July, 1839, § 15.

(h) *Erskine*, iv. 2, 5; *Stair*, iv. 42, 12.

(i) A. S., 10th July, 1839, § 91. *Dickson on Evidence*, §§ 1243, 1246.

**15. Defective Citation.**—The Act 1876 provides that a party who appears in a petition is not to be permitted to state any objection to the regularity of the execution or service as against himself.<sup>(j)</sup> This is a very proper rule. The rule previous to the statute was that such objections had to be stated *in initio litis*,<sup>(k)</sup> but it is clearly absurd to allow a person, who by the fact of appearing shows the notice to be sufficient, to waste time in pleading that it is insufficient. Where a defender does not appear, and there is an irregularity in the service, the Sheriff may authorise the petition to be served of new. This provision is useful as providing a regular way for doing what was often done in a less formal way.

**16. Service by Postal Citation.**—In the case of registered companies, and in connection with edictal citations, the post-office has, as we have seen, been used already for the purposes of serving writs, but under the Citation Amendment Act of 1882, service through it may now be used as a substitute, in every civil case, for service by an officer of Court. The schedule of citation is sent by registered letter to the defender, in place of being taken to him by the Sheriff officer, and this, if properly done and duly vouched, is sufficient service. The new method is optional, but there is a strong inducement to use it. It is considerably cheaper than the old method, and though any one who prefers the latter may still use it, he cannot recover anything higher than the fees of the new method, unless the judge deciding the cause shall be of opinion that it was not expedient in the interests of justice that the new way should have been used. It is conceivable that in some few cases circumstances might make anything short of personal service

(j) 39 & 40 Vict. c. 70, § 12 (2) and  
(3).

(k) *Hamilton v. Monkland Co.*, 19th  
March, 1863, 1 M. 672.

inexpedient, and there might be cases where it was uncertain how the new procedure could be applied; but, as in the great majority of cases, service through the post-office will be as good as any other form, the provision as to expenses imposes a strong pressure to use the new forms.<sup>(1)</sup>

**17. By whom Given.**—A warrant of citation may be executed through the post-office, either by an officer or by a law-agent.

The officer may either be an officer of the court which issued the warrant, or any other officer who, according to the existing law and practice, could execute the same. If the warrant is to be executed within the sheriffdom where it was issued, it is, of course, an officer of that sheriffdom who must make the citation. If, however, the warrant for citation have had to be indorsed in another sheriffdom in order to get jurisdiction over the defender, it would appear that it was the officer of the second sheriffdom who alone could cite. The warrant of citation in this case could not be considered to be issued till indorsed. In the case of one of the few warrants of citation which, under the Act of 1876, can be executed in another sheriffdom without indorsation, there is no difficulty in holding that the new style may be used by an officer of that sheriffdom—he being an officer who, according to the existing law and practice, could lawfully execute it. It is exceedingly doubtful, moreover, whether an officer of the issuing sheriffdom can in any case make use of the new style so as to give a valid citation in another sheriffdom which he could not give under the old. The grammatical construction of the new Act favours the reading that the powers of a Sheriff-officer to give a citation are to be the same under the

(1) 45 & 46 Vict. c. 77, § 6.

new forms as under the old, and that in regard to the persons whom he may lawfully cite, his powers are in no way to be changed.

A law-agent executing a citation under the Act of 1882 must be an enrolled one, that is, one enrolled under the Law-Agents Act of 1873. In the case of a warrant issued and executed in the same sheriffdom, no difficulty will arise. If it have to be indorsed in another sheriffdom and the person to be cited be domiciled there, it is not so clear whether it is to be an agent enrolled in the first or the second who is to execute. If the law-agent is enrolled in both, there will be less difficulty, but if he be enrolled in only one, it would rather seem that it should be the one which indorses the warrant. The Act of 1873 (*m*) says no one is to practise as a law-agent before any Sheriff Court till he has signed the roll of agents practising before it. The execution of warrants indorsed by a court would seem to be a part of its practice. There might also be more inconvenience in a person receiving a citation from an agent enrolled in some distant sheriffdom, of whom he might know nothing, in place of receiving it from a person whose identity he could ascertain without difficulty. If the warrant is one of those which can be executed in another county without indorsation there is still more difficulty, and probably agents will be cautious as to serving writs out of their sheriffdom under the new forms till these points have, in some way, been cleared up. (*n*)

The rule that an officer who is personally interested in an action cannot serve it, should be equally applicable to the law-agent. In the case, therefore, of his being a party to the suit, even though it should be only as mandatary or trustee, prudence would suggest that an agent should refrain from serving.

(*m*) 36 & 37 Vict. c. 63, § 16.

(*n*) 45 & 46 Vict. c. 77, § 3.

**18. Letter of Citation—Contents.**—The letter must contain (1) the copy of the petition which requires to be served; and (2) the proper citation; and the latter must be subjoined to the former.(o) Reading the words of the Act literally, it would appear that what is here required to be sent is the ordinary service copy of the petition and the usual schedule of citation; that is, the copy signed on each page by the Sheriff officer, and the schedule signed by him, which, under the ordinary practice, the officer would have delivered. Certainly nothing else could, at the date of the Act, be either the copy which requires to be served, or the proper citation, but as it was apparently the intention of the statute to make it possible for the law-agent to dispense altogether with the officer's assistance, a copy of the petition authenticated by the law-agent, and a citation signed by him, should be held sufficient.

The citation must specify the date of posting, and that the *induciae* within which appearance has to be lodged, is reckoned from that date.(p) Although the statute provides that this statement is to be put into the citation, it is one which is not strictly accurate, as its next clause provides that the *induciae* are to be reckoned from twenty-four hours after the time of posting.

**19. Letter of Citation—Address.**—The letter must be addressed to the defender. The name would be given in the ordinary way, and the place of delivery also in that manner,—both being specified with such distinctness that the post-office servants may, with the exercise of ordinary care, be able to discover them. It would be advisable always to have the address in the petition full enough for that purpose, but if it be not,

(o) Citation Amendment Act, 1882, § 3.

(p) *Ibid.* § 4 (1).



there could be no objection to supplementing it. The place to which the letter is addressed, must be "the known residence or place of business" of the person on whom the petition is to be served, or "his last known address if it continues to be his legal domicile or proper place of citation." The word "person" being declared to mean company, corporation, or firm, or body, to be served, there seems nothing important in these provisions. The place of intended delivery seems to be just the place where service would have been made in the ordinary way when it is made at the place of residence.(g) In the necessary case, the letter may be addressed to the office of the Keeper of Edictal Citations.

On the back of the letter, besides the address, there must be written or printed the following notice, or one to the like effect :—

"This letter contains a citation to the Sheriff Court of Aberdeen Kincardine and Banff, at Aberdeen [*or other Court*]. If delivery of the letter cannot be made, it is to be returned immediately to the Sheriff-Clerk, Sheriff-Clerk's Office, Aberdeen [*or other Clerk of Court, giving his address*]."(r)

**20. Registration and Posting.**—The letter must be registered, and this of itself fixes that it must be posted within the hours for which the post-office is open for that purpose. As the registration is acknowledged by a receipt given by the post-office official, no witness is required to the act of posting. The terms of the execution of the citation, to be made upon the petition, imply that the letter must be posted personally by the agent or officer making the citation.(s)

(g) 45 & 46 Vict. c. 77, §§ 3 and 7.

(r) *Ibid.* § 4 (4).

(s) 45 & 46 Vict. c. 77, § 3, and Sched. I.

**21. Execution of Citation.**—The execution of the citation must be written on the petition in the ordinary way, and signed either by the officer or by the law-agent. Its form is provided by the statute, and (*mutatis mutandis*) does not differ from the ordinary execution. It repeats in so many words the address given, so that its sufficiency may be apparent; and it specifies the day of posting, the hours between which it was done, and the name of the post-office. When returned, the execution must be accompanied by the post-office receipt for the registered letter, which will also contain a copy of the exact address as sent off.

**22. Effect of Postal Citation.**—The effect of a postal citation requires to be considered in two sets of circumstances—firstly in the case of the letter being returned because it could not be delivered, and secondly, in the case of the letter not being so returned.

(A) In the case of non-delivery, the letter must be returned to the clerk of court at once, through the post-office, with the reason for the failure to deliver marked upon it. These reasons, as enumerated in the statute, may be—(1) because the address cannot be found; (2) because the house or place of business named is shut up; (3) because the letter-carrier is there informed that the person addressed is not known; (4) because the letter was refused; (5) because the place of address is not within a postal-delivery district and the letter is not called for within twenty-four hours after its receipt at the office of the place; or (6) for any other cause. The clerk of court on receiving the returned letter must intimate the fact to the party at whose instance the warrant of citation was issued. He must also present the letter to the Sheriff who,—it is presumed on the motion of such party—may make if he

think fit, an order for new service, either in the non-postal form, or again through the post, and if need be may fix a new diet of appearance. If the Sheriff is satisfied that the letter was tendered at the proper address and refused (by the defender), he may hold the tender as equal to a good citation,<sup>(t)</sup> and proceed in absence, as may be right.

(B) If the letter be not returned to the clerk of court for non-delivery, it is presumed to have been delivered in terms of the execution, and relative receipt, and to constitute a legal and valid citation. The presumption may be rebutted if the defender shall prove, that the letter was not left or tendered at his known residence or place of business, or at his last known address, where it continued to be his legal domicile or proper place of citation. As a defender, according to an existing law which the new statute leaves untouched, is barred by his appearing from stating objections to a citation, it can only be where a pursuer has taken a decree in absence, that these provisions can benefit a defender. There is no limit in the statute to the time within which a defender may offer such proof, but if subsequent proceedings have followed upon the decree, the time may be practically curtailed.<sup>(u)</sup>

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### Section III.—OF ENTERING APPEARANCE.

1. *How Appearance Entered.*
2. *Appearance after Proper Period.*

3. *Withdrawing Appearance.*

**1. How Appearance Entered**—In order to enter appearance to defend the action, the defender lodges with the Sheriff-

(t) 45 & 46 Vict. c. 77 § 4 (5).

(u) *Ibid.* § 3.

Clerk, before the expiry of the *induciæ*, a notice of appearance in the form prescribed by the Act of 1876. This notice sets forth that he enters appearance to defend the action, and is signed by himself or his agent. In order to identification, its title repeats the name of the Court, and of the action.(a)

**2. Entering Appearance after Proper Period.**—It is apparently not competent to receive a notice of appearance after the expiry of the *induciæ*. The question cannot arise if decree have been taken in absence, for the defender proceeds in that case by way of reponing note. It arises where, the *induciæ* having expired, the notice of appearance is tendered before decree has been pronounced. The defender cannot here ask to be reponed; and it has not been left quite clear what step is open to him. The practice prior to 1876 varied. In some courts the defender used not to be allowed to appear on any terms in the interval between the expiry of the *induciæ* and the time when it might please the pursuer to move for decree as in absence.(b) In other courts the defender was allowed to appear after the expiry if, before decree in absence was actually pronounced, he obtained special leave from the Sheriff, granted, on such conditions as to the expenses which the late appearance occasioned, as might be thought right.(c) The latter was the preferable course.(d) It was a waste of time and expense to insist upon having a decree pronounced in order that it might immediately be recalled. The words of the Act of 1876 have greatly increased the difficulty of following the reasonable course. In former

(a) 39 & 40 Vict. c. 70, Sched. B.

1865, 4 Scottish Law Magazine, 115.

(b) *Corless v. Maver*, 1866, 5 Scottish Law Magazine, 68.

(d) See Journal of Jurisprudence, vol. xvii. p. 202.

(c) *Stiven v. Carnegie*, 14th July,

Acts it was said that if appearance were not entered in proper time, the Sheriff "might" pronounce decree in absence. In the Act now governing the matter, it is said that in the like case the Sheriff "shall on the motion of the pursuer" pronounce the decree.<sup>(e)</sup> If these words are taken literally, they involve great inconvenience. A decision as to their effect is usually avoided by the pursuer's agent consenting to the notice being received on payment of a proper amount of costs. If the words are taken literally, and the pursuer's agent will neither consent to allow the appearance, nor move for decree in absence, it is not clear what the defender can do. He should, however, take care to make due intimation to the pursuer of the tender of the notice of appearance, and of the expenses which the delay occasioned. This will throw on the pursuer the responsibility should decree be taken and damages be occasioned by it.

**3. Withdrawing Appearance.**—A defender who has entered appearance is allowed to withdraw it so long as he has not lodged his defences, and he is then held to be in the same position as if he had never appeared. There is no authority for holding that a verbal statement of the defence would preclude the defender from withdrawing his appearance. The mode of withdrawal is now always by a minute signed by the defender or his agent. Where the defender withdraws his notice of appearance, and the pursuer acquiesces and gets decree in absence pronounced, the pursuer cannot afterwards say that the withdrawing of the appearance was done irregularly, or object to the defender being reponed against the decree as against an ordinary decree in absence.<sup>(f)</sup>

(e) 39 & 40 Vict. c. 70, § 14.

(f) *Gray v. Low*, 22nd Feb. 1856, 18 D. 628.

Sometimes an agent who has entered appearance withdraws from acting for the defender; but this is quite a different thing from withdrawing appearance, and involves no legal consequences. In this case, on the motion of the pursuer, intimation of the agent's withdrawal is sometimes made to the defender, but this seems matter for discretion, it being the duty of the retiring agent himself to give reasonable notice to his client of his ceasing to act.

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#### Section IV.—OF DECREE IN ABSENCE AND REPONING.

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| <ol style="list-style-type: none"> <li>1. <i>Nature of Decree in Absence.</i></li> <li>2. <i>When Competent.</i></li> <li>3. <i>When Pronounceable after Appearance Entered.</i></li> <li>4. <i>Form of Decree and Extracting.</i></li> <li>5. <i>Reponing against Decree in Absence.</i></li> <li>6. <i>Reponing within Seven Days.</i></li> <li>7. <i>Reponing after Seven Days.</i></li> </ol> | <ol style="list-style-type: none"> <li>8. <i>Reponing under Act of 1853.</i></li> <li>9. <i>Reponing under Act of Sederunt of 1839.</i></li> <li>10. <i>What Implement prevents Reponing.</i></li> <li>11. <i>Finality of Certain Decrees in Absence.</i></li> <li>12. <i>Amending Undefended Petitions.</i></li> </ol> |
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**1. Nature of Decree in Absence.**—A decree in absence is the decree which is pronounced when the defender does not intend to state any defence, or when he delays to do so; and in the latter case it forms a means of compelling him to make his appearance. As no one can tell at first whether the failure to appear has been because the defender has had no defence or because he has wanted delay, the utmost facilities are given for having the decree recalled. That is done—so long as the decree is not “implemented”—by a proceeding (called reponing) under which the defender consigns a sum to meet the expenses incurred, and obtains leave to plead. If the defender allows the decree to become

implemented (that is, fulfilled in part or in whole, which can only be after due notice), the difficulty of getting leave to plead, in so far, at all events, as concerns the implemented part, is greatly increased, and application to the Court of Session is required.

**2. When Competent.**—If appearance be not entered, decree in absence may be taken by the pursuer at any court on which he chooses to enrol the case after the expiry of the *inducia*. Should decree in absence happen to be pronounced before the expiry of the *inducia*, it is null, and the defender is reponed without being required to consign expenses, as in the case of reponing against a regular decree in absence.(a) It is a question how long it remains in the power of the pursuer to take decree in absence after the expiry of the *inducia*. If he bring the cause into court by enrolling it, he would require to take some step within a year and day, otherwise the action would fall asleep. To preserve evidence of the enrolment, an interlocutor continuing the cause should be written. In this case it would rather appear that if he took the proper steps to waken the action, he might after the lapse of the year and day still take decree in absence. But if he do not bring the action before the court, and a year and day elapse from the expiry of the *inducia*, the action is dead, and the pursuer must bring a new one.(b)

**3. When Pronounceable after Appearance Entered.**—Even after appearance had been entered, it was formerly competent to take decree in absence, if the defender failed to attend when the case was first enrolled. This proceeding

(a) *Downie v. Peebles*, 27th Nov. 1841, 4 D. 117.

(b) *M'Kidd v. Manson*, 18th May, 1882, 9 R. 790.

could not now be sustained. It was against the apparent intention of the Act of 1853, and is still more plainly against the Act of 1876(c). Under the older modes of proceeding, the first enrolment in court, or "calling" of the cause was an important step, and decree in absence was pronounced against a defender who failed to attend. Now, the step has no importance, and the formal calling of a cause seems unnecessary. Where appearance is entered, and it has not been withdrawn by a minute, the pursuer's course is to wait till the expiry of the time for lodging defences; and then if they be not lodged, he may take his decree. It will then be pronounced "in respect of no defences," but may still be treated as a simple decree in absence, the theory being that the defender by failing to lodge his defences abandoned his intention to defend.(d) In Lanarkshire it has been held differently, but (as I think) erroneously.(e) There is nothing in the Act of 1876 to make it necessary to treat a decree for failure to lodge defences as a "decree by default," which would often materially increase the defender's difficulty in getting himself reponed.(f) But if the defender himself elect to treat such a decree as one by default, there seems nothing to prevent him. Thus there is a case in which a defender having asked a prorogation for lodging defences and the Sheriff having refused it and decerned, an appeal was taken (without objection) as against a decree by default, and the defender was reponed in the Court of Session.(g)

#### 4. Form of Decree and Extracting.—A decree "in absence"

(c) 39 & 40 Vict. c. 70, §§ 14 and 16.  
 (d) *Marjoribanks v. Borthwick*, 18th Feb. 1857, 19 D. 474; 16 & 17 Vict. c. 80, §§ 2 and 6.

(e) *Sellar's Forms*, vol. i. p. 268.

(f) See also *Mackay's Court of*

*Session Practice*, vol. i. p. 586, and the *Court of Sessions Act of 1868* (§ 22), which has incorporated the rule of the common law on this point.

(g) *Bainbridge v. Bainbridge*, 18th Jan. 1879, 6 R. 541.



usually bears to have been pronounced in that way, although the omission of these words would not alter its character. It is always a decree in terms of the conclusions of the petition, unless the pursuer (by minute) have restricted his claim.(h)

Sometimes it is of consequence to a pursuer to preserve evidence of his claim, and the power to do so, although not often used, is valuable. As the power under the older practice was undoubted,(i) and as there is nothing in the recent Acts to take it away, it still exists. Notice of the appointment for proof must be given to the defender.(j)

When the pursuer takes decree in absence he ought to ask for expenses, which will be included as a matter of course. Where the pursuer has omitted to ask for expenses it has been held that he may come back and ask for them so long as the first decree was not extracted.(k)

The normal period for extracting is seven days after the pronouncing of the decree, and it would seem that the Sheriff has no power to shorten it. The provisions of § 32 of the Act of 1876, as to allowing extract of a decree within a shorter than the prescribed period apply only to defended actions, and if the power were to be exercised in undefended actions, the regulations as to reponing could not be fairly applied. If *induciae* and period of extract could both be shortened, it might be possible to snatch a decree which could be opened up only in the Court of Session.(l) Where a period of extract shorter than seven days is at present competent by force of law, the statute does not seem to abrogate it.

(h) 39 & 40 Vict. c. 70, § 14.

(i) A. S., 10th July, 1839, § 24.

(j) *Ibid.* § 76.

(k) *Williamson v. Williamson*, 27th Jan. 1860, 22 D. 599.

(l) 39 & 40 Vict. c. 70, § 14.

**5. Reponing against Decree in Absence.**—The defender may be reponed against the decree in absence, whether it has been extracted or not, at any time before implement has followed upon it, or thereafter against such part of it as may not have been implemented ; and there are two situations in which a defender (*m*) may have occasion to ask to be reponed, —firstly, when the decree has been pronounced, no appearance having been entered ; and secondly, when it has been pronounced, appearance having been entered, but afterwards withdrawn or (by failure to lodge defences) abandoned. The fourteenth section of the Act of 1876 provides the form to be followed when no appearance has been entered, and it varies according to whether the application be presented within seven days after the date of the decree, or beyond that period.

**6. Reponing within Seven Days.**—At any time within the seven days the defender may obtain the recall of the decree in the following manner :—He must (1) consign the sum of £2 in the hands of the Sheriff-Clerk, and (2) lodge his defences. He may then enrol the action in the Sheriff's motion roll. This motion will be heard on the first court-day, whether in session or vacation, which may occur, and the defender is then reponed. The pursuer gets the consigned money, unless the Sheriff sees cause to the contrary ; the defences are received ; and the action proceeds as usual.—(Act of 1876, § 14, 1.)

It will be seen that, where the seven days have not elapsed, and the decree is (in the usual case) unextracted, a reponing note is not necessary. The matter is done by consigning the

(*m*) It is hardly necessary to say that, if the original defender has died, his executors may make use of this provision ; *Pearson & Jackson v. Alison*, 31st Jan. 1871, 9 M. 473.

money, lodging the defences, and enrolling the action. After this is done, the Act provides that the decree cannot be extracted until the motion for recall has been disposed of.

The Act of 1876 does not expressly provide for the case of the decree being extracted within the seven days. In certain cases this is competent, and it is not clear what course is to be followed; but as the provision for reponing under the Act of 1853 has not been repealed, and as in this case it has not been superseded, the only course I can recommend is to proceed under it. If the defender can wait till the seven days from the decree are out, he can proceed under the following provision, which is applicable whether the decree has been extracted or not.

**7. Reponing after Seven Days.**—When the seven days have expired from the date of the decree, and whether it have been extracted or not, the defender may obtain the recall of the decree at any time before implement has followed thereon, or so far as the same has not been implemented. In this case he must present a written note explaining why he failed to enter appearance, and why he failed to get himself reponed within the seven days. With this note he must lodge—(firstly) his defences; (secondly) any documentary evidence he may have in support of his explanation; and (thirdly) the sum of £5.—(Act of 1876, § 14.)

It is implied that this note shall be intimated, because it is provided that after intimation to the pursuer or his agent, and till refused, it shall operate as a sist of diligence.—(Act of 1876, § 14, 3.) As no form of intimation is prescribed, it will be requisite to proceed in the form used prior to 1876, according to which a copy of the note was, at the time of lodging, delivered or transmitted through the post to the pursuer or his agent in the action.

After intimation, parties are heard *viva voce* upon the note, and the Sheriff, if satisfied with the explanation,<sup>(n)</sup> is empowered to recall the decree so far as not implemented, and to order payment to the pursuer out of the consigned money of his expenses, including those of any charge or diligence upon the decree. Should the decree be recalled under this section, the action proceeds in the ordinary manner.

When the defender proceeds under the Act of 1876, he has the advantage that, if the Sheriff recalls, the interlocutor is final and not subject to review. The statute also makes orders incidental to the recall final, so that, if the decree be recalled, all the proceedings connected with it are beyond review.—(Act, § 14, 4.)

**8. Reponing under Act of 1853.**—As the provisions of the Act of 1876 as to reponing are only empowering provisions, and as there may be cases where it is still necessary to proceed under the Act of 1853, its provision may be explained. Section second of that Act is directed to the case of decrees which have been pronounced where no appearance has been entered. Section second of the Act of 1853 in that case provides that the defender is to present a note in the form prescribed by the statute (schedule B), and to consign therewith any expenses that may have been decerned for. A copy of this note being at the same time delivered or transmitted through the post-office to the pursuer or his agent in the action, the statute declares that a certificate by the Sheriff-Clerk, purporting that the note has been lodged, shall operate as a sist of diligence.<sup>(o)</sup> The Act of 1853 does not say that this certificate must be

<sup>(n)</sup> *Smith v. Inglis*, 14th June, 1881,  
18 S. L. R. 565.

<sup>(o)</sup> 16 & 17 Vict. c. 80, § 2.

intimated to the pursuer; but, as the sist under the form in use before 1853 was of no avail until it had been so intimated,(p) it would seem advisable to do so. When the reponing note has been lodged, and consignation has been made, the Sheriff is directed to pronounce judgment reponing the defender. In the judgment reponing, the Sheriff is to appoint the consigned money to be paid over to the pursuer, unless there appear special cause to the contrary. If expenses have been incurred by the pursuer subsequent to the date of the decree (for instance, in taking any step towards diligence) prior to the application to be reponed, the Sheriff may decern for those expenses, or for such part thereof as may appear to him to be just. After reponing, the action proceeds in the same manner in all respects as if appearance had been made.

**9. Reponing under Act of Sederunt of 1839.**—The benefit of the modes of reponing provided by the Acts of 1853 and 1876 appears to have been limited to the case of the decree having been pronounced where appearance has never been entered. Probably this restriction was unintentional; and it is not practically important, because there are comparatively few cases where decree in absence is pronounced after appearance has been entered. If it were possible to hold the words in the Acts of 1853 and 1876 as to appearance not having been entered, as including the case of appearance having been entered but afterwards withdrawn or abandoned, the form would suit all cases, and this, no doubt, would be the sensible reading. If a narrower reading be taken, then the form for

(p) 1 & 2 Vict. c. 119, § 18; A. S.,  
10th July, 1839, § 115; Anderson v.  
Anderson, 6th June, 1855, 17 D. 804;

and see Gray v. Low, quoted *supra*,  
p. 133, note (f).

reponing prior to 1853 may be used, and there would at all events be safety in that course.(q) It is regulated by the Act of Sederunt of 1839, § 115. The principal differences are, that the defender applies by petition instead of note; that part implement prevents reponing altogether, and not merely as to the part that has been implemented; and that there is an express direction to intimate the sist to the pursuer.

**10. What Implement prevents Reponing.**—Implement of a decree having an important effect in preventing reponing, it is of consequence to inquire what it means. That will best be shown by taking the case in which it is held to happen. A decree is implemented when a poinding has taken place under it, whether the poinding have been reported to the Clerk of Court, or whether a warrant to sell the poinded effects have been granted or not.(s) It is also implemented when the person of the debtor has been incarcerated.(t) In short, it has been implemented whenever the property or person of the debtor has been taken in execution of the debt.

It is not altogether plain what is the meaning of being reponed after part implement against such part of the decree as has not been implemented. If there have been a payment to account of the debt, or if an instalment have been paid under a decree (such as one for aliment) payable by instalments, it may safely be assumed that the defender may be reponed to the effect of disputing his liability for further

(q) *Chard v. McCulloch* (Glasgow Sheriff Court, 1874), 18 *Journal of Jurisprudence*, 450, and the case reported immediately before it.

(s) *Stephenson v. Dobbins*, 17th Feb. 1852, 14 D. 510; *Anderson*, quoted p.

141; note (p) (both decided on the Act of 1838); *Rowan v. Mercer*, 12th May, 1863, 4 *Irv.* 377 (decided on the Small-Debt Act).

(t) *MacLachlan v. Rutherford*, 10th June, 1854, 16 D. 937.

payments. But if there have been imprisonment, can the defender be reponed to the effect of preventing a pointing? and *vice versa*; or if there have been a pointing which will not produce more than part payment, can he be reponed to the effect of preventing farther diligence? The decisions already pronounced throw little light on these questions, for they turned on clauses which either expressly said, or which the Court understood to say, that implement in part altogether excluded reponing. Still they show what "part implement" means, and as it is difficult to suppose that anything can be the whole implement of a decree for payment except payment in full, it is probable that such a meaning will be given to the clause saying that the defender may be reponed against the part of the decree which has not been implemented, as will prevent the use of further diligence than that which has begun.

**11. Finality of certain Decrees in Absence.**—A clause declaring that certain decrees in absence are to receive effect as decrees *in foro*, has been copied into the Act of 1876 from the Court of Session Act of 1868. Probably in the Court of Session it was a useful clause, but as applicable to the Sheriff Courts it is not so easy to understand its object. It divides decrees in absence into two classes, namely, those in which a charge is competent, and those in which it is not competent.

Where the charge is competent, the decree in absence is entitled to all the privileges of a decree *in foro*, subject to the following conditions:—Firstly, there must have been either personal service of the petition, or an authorised entering of appearance, or a personal charge; secondly, the decree must not have been recalled under the reponing provisions of the Act of 1876; thirdly, a charge must have been given; fourthly, six months must have elapsed from the date of the

charge; and lastly, the charge must not have been brought under review by suspension, where suspension is competent.(u) What reward the pursuer obtains after he has accumulated these circumstances is not so clear. There is plainly an end of the power of reponing in the Sheriff Court, and of the power of taking the case to the Court of Session by way of appeal. Possibly there is an end also of the power of suspending. But the decree is not final, because the Court of Session can reduce a Sheriff Court decree *in foro* just as much as it can reduce a decree in absence.

Decrees in absence in the Sheriff Court on which a charge is not competent seldom occur. The cases of an interdict or declarator where there is no decerniture for expenses, are about the only ones which may occur frequently. Such decrees are to become final after the lapse of twenty years from their date, provided, firstly, there has been either personal service or an authorised entering of appearance, and secondly, provided the decree have not been sooner recalled or at least brought under review by suspension or reduction.(v)

**12. Amending Undefended Petitions.**—The Act of 1876 contains a provision on the subject of amending Undefended Actions. The old law on the subject is contained in the Act of Sederunt of 1839 (§ 13) which simply says, that “when a libel is amended in absence of the defender, a copy of the amendment must be served upon him in the same manner and on the same *induciae* as the original libel.” Here, nothing being said as to what amendments are competent, that matter was left to the common law; the amendment was necessarily by minute; and service of the amendment was essential. The

(u) 39 & 40 Vict. c. 70, § 15.

(v) *Ibid.*



Act of 1876 provides, Firstly, that any error or defect in an undefended petition may be amended if the Sheriff shall think such amendment should be allowed. This removes the limits which used to fetter the Sheriff, and leaves it entirely to his discretion to allow or refuse. The Act next provides that the amendment, duly signed by the pursuer or his agent, may be written either on the petition or on a separate paper. This makes a minute of amendment not absolutely necessary. Lastly, the Act says that the Sheriff may, "if he shall see fit," order the amended petition to be served, and allow the defender to enter appearance within such time as shall seem proper. This makes it unnecessary to serve again, for example, should the amendment be trivial; and unnecessary when the amendment is served that the new *induciae* should be of the same length as the original.

The expenses of an amendment in absence are not chargeable against the defender.

The amendment in absence has not a retrospective effect in validating diligence on the dependence in questions with creditors, but it has that effect in questions with the defender himself, or with any person representing him by a title or in right of a debt contracted by him after the diligence.(w)

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#### Section V.—OF PROTESTATION FOR NOT INSISTING.

"Protestation for not insisting" is the name given to the remedy which a defender has against a pursuer who has served a petition on him but neglects to go on with it; and the effect is to oblige the pursuer either to go on with the action or to abandon it. On the first or any subsequent court-day after

(w) 39 & 40 Vict. c. 70, § 13.

the *induciae* have expired and appearance has been entered, the defender, if the pursuer has failed to lodge the petition, may put the cause to the roll. Should the pursuer then fail to be present, the defender may "put up protestation against him for not insisting." The form for doing this is regulated by chapter six of the Act of Sederunt of 1839.(x) The defender produces his copy of the petition, and, on the pursuer failing to appear and insist, craves protestation. The Sheriff thereupon admits it, and modifies what is called the protestation money, which is a sum awarded to the defender to remunerate him for his trouble and expense.(y) The protestation cannot be extracted till the expiry of seven free days after the day on which it was granted—unless in the case of arrestments having been used, when it may be extracted on the lapse of forty-eight hours. So long as the protestation is not extracted the pursuer may appear and insist in the action on payment or tender of the protestation money. If the protestation be extracted, the effect is the same as if the petition had been dismissed. The extract contains a precept of poinding and arrestment for recovery of the protestation money, and the dues of the extract.

The use of protestation is rare ; but it is given here because it seems still to be the only mode of reaching a pursuer who hangs back without appearing at the earlier stages of a cause. There is no authority (as in the case of the Small-Debt Act) for summarily dismissing in absence a petition which the pursuer has failed to appear to support ; and until the pursuer has at least returned the petition and has failed to obey some

(x) A. S., 10th July, 1839, § 25. Although competent at an earlier stage, the defender may take the step after his defences are lodged if the pursuer does not then lodge the petition.

(y) Sellar's Forms, vol. i. p. 257. If the motion is made after defences are lodged, they will be included in the expenses.

competent order, he cannot be treated as in default. . If, however, the petition (and any requisite documents) have been lodged by the pursuer, there seems no reason under the new rules why he should appear personally or by an agent in Court till after the defences are lodged. After these have been lodged, there will be pronounced either an order to revise or one to adjust, and if the pursuer fails to lodge his revised condescendence or to attend the meeting for adjusting, he can then be treated as in default. And where practicable this course is to be recommended, the form of "protestation for not insisting" being more adapted to an earlier style of practice than to the forms now in use.

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#### Section VI.—OF THE DEFENCES.

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| 1. <i>Time for Lodging Defences.</i>                | 4. <i>Answers to Pursuer's Statement.</i>                 |
| 2. <i>Prorogation of Time for Lodging Defences.</i> | 5. <i>Defender's Statement of Facts and Pleas in Law.</i> |
| 3. <i>Form of the Defences.</i>                     |   |

**1. Time for Lodging Defences.**—The time for lodging the defences is the first court-day after the expiration of the *inducia*. If not lodged on that day, the Act of 1876 says, that they may be lodged at the latest at an adjourned diet not later than seven days after the expiration of the *inducia*. The defences are in either case to be lodged with the Sheriff-Clerk. It is apparently intended that the cause is to be called on the first court-day, and that the defender is then either to lodge his defences or to ask an adjournment to a specified day and hour. But that intention cannot be carried out. As the first alternative of the Act simply says that the defences are to be lodged on the first court-day, the defender has in any view till

the close of business hours on that day in which to lodge his defences. Till then the adjournment cannot be pronounced, and by that time the Court may be over. There is also the consideration that it is practically impossible to hold adjourned diets of court at the expiry of seven days from the end of the *induciae* in every petition. From the defender having had given to him the alternative of lodging his defences either on the first court-day or at an adjourned diet, it would seem that he has right to at least seven days from the end of the *induciae* to prepare his defences. If this be so, it seems to me that it is not necessary that he should ask for the adjournment, but that the Sheriff-Clerk ought to receive the defences if tendered at any time not later than the seven days. It will be observed that if the first court-day is held seven days after the expiration of the *induciae* longer time is not allowed.

**2. Prorogation of Time for Lodging Defences.**—It is a question of some importance whether the Sheriff can prorogate the time. The defender may not be able to consult a law-agent till the time for entering appearance, and in that case to give only seven days to prepare the defence might be far too short. In many instances it would be a mere inducement to make reckless assertions, or reckless denials, and thus an encouragement to unjustifiable litigation. Possibly, also, while the seven days are running, every source of information may be closed, as the defender may be ill or from home. Even an accident may prevent the lodging of the defences within the seven days. The Act of 1853 (§ 6) provided for such emergencies by saying that the periods appointed for lodging any paper, or for transmitting any process to the Sheriff, or for closing a record, might always be once prorogated by the Sheriff on special cause shown, or by consent. A clause (§ 19) in the

Act of 1876 abolishes prorogations of consent of parties, but nothing being said as to prorogations for cause shown, so necessary a power as that of granting them cannot be held to be taken away by implication. It will be noticed, however, that this view only authorises at most one prorogation.(a)

**3. Form of the Defences.**—The defences are to be in the form of articulate answers to the condescendence, having a note of pleas in law and, where necessary, a statement of facts annexed. The Act of 1876 gives the practitioner in framing his defence the same directions as are given with regard to the condescendence, namely, that the answers and statement of facts shall be made succinctly and without quotation from documents except where indispensable.(b)

**4. Answers to Pursuer's Statement.**—There are no directions in the Acts of 1853 or 1876 for framing answers to the pursuer's statements, but the directions in the Act of Sederunt of 1839 seem still applicable. Under these, the defender meets in their order the pursuer's statements of fact, by admitting or denying them, either absolutely or with qualifications, but without argument, and with such explanations in point of fact, applicable to each averment, as are necessary to make his answers intelligible, and to found his pleas in law.(c) Under these directions, the answer to each article must be concise, and should be specific. If the defender desires to admit the greater part of one of the pursuer's statements, the answer should be "admitted with the

(a) 39 & 40 Vict. c. 70, § 19; 16 & 17 Vict. c. 80, § 6; Bainbridge, 18th Jan. 1879, 6 R. 541.

(b) 39 & 40 Vict. c. 70, § 16. The Act

of 1853 also directs that defences shall be framed as concisely as may be, without argument or unnecessary matter.

(c) A. S., 10th July, 1839, § 32.

exception of [pointing out the disputed part] which is denied " or "not admitted," as the case may be. If he means only to admit a small part, his answer refers to and admits it, and adds, *quoad ultra* denied, or not admitted, as may be. Each answer must be complete in itself. A form in common use, of denying under reference to the defender's statement, is objectionable, as it is neither complete nor clear. Another form in common use, that of denying a statement in so far as it is inconsistent with the defender's statement, is also objectionable. The defender generally takes it to mean more than it does; and forgets that in using it he may be admitting statements destructive of his case, but which, being possibly true over and above, are not inconsistent with his averments.(d) Where the defender desires entirely to rest upon his own account of the matter, the proper form of answer is one suggested by the first Lord Curriehill,(e)—viz., to deny the pursuer's averments in so far as they do not coincide with his own. But this form of answer, though the only one of its kind that is accurate, is not often to be recommended. The use of counter averments in the answers to the pursuer's averments should be sparing. The proper place for these is (as the statute points out) in the defender's own statement of fact. Of course all equivocal answers must be carefully avoided, as these may be construed against the party making them.

If the condescendence contains any statement of fact which is within the defender's knowledge, and the defender do not deny it, he will be held to have admitted it.(f)

(d) *Andersons v. Low*, 13th Nov. 1863, 2 Macph. 100.

(e) See *Campbell v. Campbell*, 8th Jan. 1863, 1 Macph. 217.

(f) A. S., 10th July, 1839, § 55. This rule applies equally to a pursuer answering a defender's statements.

**5. Defender's Statement of Facts and Pleas in Law.—**

The observations on the mode of framing the pursuer's statement of facts and pleas in law are in general applicable to the framing of the corresponding pleadings for the defender. The defender is under no restriction as to the grounds of defence which he may state, but he must take care that he now discloses his whole case. For example, if he objects to the pursuer's title he must state the nature of his objection, for he would not be allowed under the objection of no title to bring up objections of which the pursuer has no notice.<sup>(g)</sup> The defender's statement must contain the facts necessary to found his pleas; and he must append a note of these similar in character to the pursuer's. It is advisable, as tending to clearness, that he should so frame his pleas as to show distinctly which of the pursuer's propositions he controverts, and what separate propositions he sets up on his own behalf. The defender must state all his pleas at once. The privilege which the methods of pleading in use before 1853 gave to him, of stating first his dilatory pleas and then his peremptory pleas, has been abolished.

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**Section VII.—REVISING, ADJUSTING, AND CLOSING RECORD.**

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| 1. <i>Revising the Pleadings.</i>        | 5. <i>Adjusting Record.</i>               |
| 2. <i>Additions on Revisal.</i>          | 6. <i>Striking out Irrelevant Matter.</i> |
| 3. <i>Meeting to Adjust.</i>             | 7. <i>Closing Record.</i>                 |
| 4. <i>Disposal of Dilatory Defences.</i> | 8. <i>Procedure after Closing Record.</i> |

**1. Revising the Pleadings.**—The seventeenth section of the Act of 1876 provides that neither party shall be entitled as matter of right to ask for a revisal of his pleadings, but

<sup>(g)</sup> *North British Railway Co. v. Brown, Gordon & Co.*, 12th June, 1857, 19 D. 840.

that it shall be competent for the Sheriff to allow or order a revisal upon just cause shown. Under the Act of 1853, when the pursuer was willing to close on summons and defences, with the addition of a denial of the defender's statement so far as not coinciding with his own, it was incompetent to order a revisal,<sup>(a)</sup> and it would now require very strong cause to justify it. Excepting at the pursuer's request, and where the defender has made a separate statement of fact, a revisal is seldom necessary.

The time at which the motion for revisal is to be made is left to inference. From the eighteenth section of the Act of 1876 it appears that it ought to be made before the process is transmitted to the Sheriff with a view to adjustment, but there is no precise provision for the pursuer seeing the defences before that time. It is apparently contemplated that the pursuer is either to be present when defences are lodged, or at least is to have the opportunity of seeing them on the day of lodging. It will be simple enough for him, if the defences be lodged in Court when the cause is called to move then for a revisal. Should they be lodged out of court, he always knows when the defences are due, and he can then see them, and, if he thinks right, can ask the cause to be enrolled for the purpose of moving for the revisal, and until this motion is disposed of the Sheriff-Clerk should not transmit the process to the Sheriff. In order to give the pursuer time to see the defences, the Sheriff-Clerk should not transmit the cause to the Sheriff till twenty-four hours after the defences are lodged. When the order to adjust has been pronounced, the power to order a revisal is gone.

When an order for revisal is pronounced, it will now be

(a) 16 & 17 Vict. c. 80, § 4; *Campbell v. Campbell*, 8th Jan. 1863, 1 M. 217.



almost necessary to make it an order to revise on separate papers. The care with which the Statute (§ 10) directs that the principal petition is not to be borrowed without express permission, shows that it is not intended that it should be meddled with more than is necessary, and if the certified copy were altered it would no longer answer its description or purpose. As the revised condescendence should thus be on a separate paper, it will be convenient to have the revised defences in the same form.

For reasons stated above (p. 148), I think it will be competent for the Sheriff to prorogue once, on special cause shown, the time for lodging a revised pleading.

**2. Additions on Revisal.**—In revising, the pursuer corrects, modifies, or amplifies, his original statement; adds his answers to the defender's statements; and gives any new pleas in law which he thinks right. So far there is no difficulty, but difficulties sometimes arise when the pursuer wishes to add on revisal new grounds of action not comprehended within those stated in the petition. Here it is necessary to distinguish three cases—*firstly*, when the new grounds to be added are of the same kind as those contained in the petition, and are therefore in a manner supplementary to it; *secondly*, when they are not of the same kind, but are altogether distinct; and *thirdly*, when they arise as matter of replication to the defender's case.

When the new grounds of action are of the first kind, great latitude is allowed to the pursuer in the way of making additions. This latitude was allowed even in the Court of Session, where, previous to the Act of 1868, the rules as to pleading were more stringent than in the Sheriff Court. Thus, while in an action against the drawer of a bill it is

clear that the statement that the bill has been duly negotiated is a material ground of action, it has been held that when omitted in the petition it may be added in revising the condescendence.<sup>(b)</sup> A still stronger illustration of this principle was afforded in an action for damages for slander, where a pursuer was allowed to add at revising two new instances of the alleged slander, uttered at different times and places and before different parties from those stated in the original condescendence.<sup>(c)</sup> Whenever, therefore, the new matter added in the condescendence, though it may technically form a new ground for supporting the action, does not in any material way alter the nature of the case laid against the defender in the petition, but merely states it with greater amplitude and completeness, the new matter should not be rejected, and no just and reasonable system of pleading would require its rejection.

When the new grounds of action are not of the same kind, and do not supplement those stated in the original condescendence, it was formerly held that the pursuer could not competently add them, but this rule is not now enforced with any degree of strictness. This rule was laid down in the Court of Session,<sup>(d)</sup> and was also the old rule in the Sheriff Court before the time at which it became imperative on the Sheriff to allow a much greater latitude in the way of amending. Nothing is gained now by enforcing it so long

(b) *M'Donald v. M'Quarrie*, 29th Feb. 1860, 22 D. 922.

(c) *Hewatson v. Irving*, 10th March, 1853, 15 D. 519. See preceding note. The additions in this case seem to have gone to the full length which is permissible, for they were allowed with great difficulty, and only on payment of expenses.

(d) *Burness v. Goodfellow*, 5th June, 1858, 20 D. 1084; *London Joint-Stock Bank v. Stewart*, 14th Jan. 1859, 21 D. 250. See also *Macdougall's Trustee v. Law*, 18th Nov. 1864, 3 M. 68, where the additions were allowed to be looked at as explanatory of the original statements.

as the additions are not greater than those which the Sheriff would be obliged to admit by way of amendment. It is, therefore, the practice to allow at revisal all such additions to be made as are necessary for the purpose of determining in the action, the real question in controversy between the parties—provided always that no larger sum or estate, and no fund or property other than that specified in the petition be subjected to adjudication, except of consent of all parties. If any one, however, were to object to a new ground of action being added in this way, it would be requisite for the Sheriff to give formal leave to amend.(e)

In the third case, when matter not covered by the petition is introduced into the condescendence by way of reply to the grounds of defence brought forward by the defender, it cannot rightly be said that it forms a new ground of action at all. It is a matter of replication, which it is of necessity competent for the pursuer to add. When a pursuer, for instance, brings an action of slander which does not (on the face of it) disclose a case of privilege, but where the defender pleads matter in defence which does disclose such a case, it will be competent for the pursuer to reply that the slander was spoken maliciously and without probable cause. To take another illustration, if a pursuer found upon a bond, and the defender pleads that it is not duly authenticated, the pursuer may plead by way of replication that the defender is barred by *rei interventus* from stating the objection.(f) These illustrations sufficiently explain the principle.

The defender is allowed the same latitude in revising his

(e) As to amendments see *infra*, chap. iii. § 4, and 39 & 40 Vict. c. 70, § 24.

(f) *United Mutual Mining and General Life Assurance Society v. Murray*, 13th June, 1860, 22 D. 1185.

defences, as is given to the pursuer in revising his condescendence—care always being taken that (as a second revisal is incompetent) the pursuer at adjusting shall have a full opportunity of answering any new matter the revised defences may contain, and that a defender shall pay any expense which he may cause by bringing forward at a late, what he ought to have brought forward at an early stage.

**3. Meeting to Adjust.**—The next step is for the Sheriff-Clerk to transmit the process to the Sheriff with a view to adjusting. This is to be done at once where no motion for revisal is made, or where it is made and refused. If a revisal is ordered, the Statute of 1876 says that the process is to be transmitted after the lapse of the period within which the revised pleadings fall to be lodged. This is meant to supersede the necessity for taking decree by default for failure to lodge the revised papers. The provision apparently does not take effect till after the period for lodging both papers has elapsed, though if the revised condescendence be not lodged when due, there is little use waiting for the revisal of the defences. Where the clerk, as will generally happen in this case in question, has not the whole process in his hands it is plain that he must transmit what he has. The result of these regulations apparently is that if the parties fail to revise, they simply lose the opportunity.

When the process is transmitted, the Sheriff is to direct the action to be put to the roll for the first court-day occurring not less than four days thereafter. The reason for the interval being allowed before adjustment is obvious, and it is therefore plain that the interval should be allowed between the date of the Sheriff returning the process and the adjusting day, and not after the date of transmission to him.

Upon the day for adjustment, the Statute of 1876 says that the Sheriff shall require the parties then to adjust their pleadings, and shall close the record.(g) This language is peremptory, but as the power of once prorogating the period for closing the record, which is given by section 6 of the Act of 1853, has not been repealed, it must be taken still to exist.—(*Supra*, p. 148.)

The Act of 1876 does not state what is to be done at the meeting for adjustment, but that will be found stated in the Act of 1853, the provisions of which seem still applicable.

**4. Disposal of Dilatory Defences.**—The first business at the meeting is (where possible) to dispose of any dilatory(h) defences that may have been stated. If it be not possible to dispose of them at once, the Sheriff may reserve consideration of them till a future stage of the cause.(i) These provisions have given rise to discussion, though the practice now is believed to be uniform. Some used to read them as a direction to the Sheriff to continue the old practice of deciding on the dilatory defences before closing the record; and of not looking at the merits until the preliminary pleas had been disposed of finally. This way of reading the provisions gave direct encouragement to an abuse of the forms of process, so as to obtain delay. A more reasonable meaning is given to the provision when the direction to dispose of the dilatory defences, where possible, is taken to mean to dispose of them

(g) 39 & 40 Vict. c. 70, § 18.

(h) Dilatory defences "are those which have the temporary effect of obtaining for the defender a sentence absolving him from the depending suit, without cutting off the pursuer's right of bringing a new action;" Ersk. iv. 1. 67. Pleas on the relevancy are not

dilatory defences (though they are sometimes confounded with them), because, if the action is found irrelevant, it can never be brought again. Compare *Hill v. Dymock*, 7th July, 1857, 19 D. 955.

(i) 16 & 17 Vict. c. 80, § 4.

at that time, wherever it is practicable by some order or step to put an end to them altogether. Thus, if a dilatory plea be stated that all interested in the action were not called as parties, the provision would be held to mean that the Court was then to consider whether the plea could not at once be disposed of by pronouncing an order for the calling of such additional parties as might be requisite: and if that appeared practicable, to pronounce the order.<sup>(j)</sup> And there are other cases where the dilatory pleas are founded in like manner on matters capable of rectification, where it may be desirable and practicable to dispose of them at once.

It has sometimes been maintained that dilatory defences are to be held as repelled if they are not expressly reserved in the interlocutor closing the record. This may have been true at one time in the Court of Session, but even there the more sensible rule, that the defences are to be held as reserved when not expressly repelled, has been acted on since the Judicature Act;<sup>(k)</sup> and there is no ground for applying any different rule in the Sheriff Courts.

**5. Adjusting Record.**—At the meeting to adjust the record, the Sheriff allows the pursuer (if this has not already been done) to add to his condescendence his answers to the defender's statement of fact.<sup>(l)</sup> In place of these answers the pursuer may simply minute his denial of the defender's statements in so far as not coinciding with his own, if this be deemed sufficient by the Sheriff. The pursuer's answers, or this minute,

(j) Compare *Watt v. Kempt*, 22nd March, 1865, 3 M. 730, which illustrates the inconvenience of this course not being followed.

(k) *Johnstone v. Arnott*, 23rd Jan. 1830, 8 S. 383.

(l) 16 & 17 Vict. c. 80, § 4. It is not competent to delay the meeting for adjustment, by making a separate order for these answers, and allowing a separate time for making them, *Kessack v. Garden*, 27th Feb. 1869, 7 M. 583.

having been recorded, the Sheriff allows each party to adjust his own part of the record.(m) In doing this it is clear that neither party has the power, without the consent of the Court, to add any new statement to the record. The power is simply to adjust the record of the statements that have already been made, and it should not extend beyond the correction of any inaccuracies, and the addition of any explanation required, either by the answers of the opposite party, or for the sake of clearness. If it be discovered that new statements of fact are necessary, the strict course is to allow the pleadings to be amended on payment of expenses, and to adjourn the meeting to give the opposite party the opportunity of answering the additional statements. As no alteration or addition to a paper once lodged can be made without the leave of the Court,(n) parties must take care in adjusting that their alterations before being made in a permanent form, have first been seen and allowed.

**6. Striking out Irrelevant Matter.**—After all this has been done, the Statute of 1853 places on the Sheriff the duty of striking out of the record any matter that he may deem to be either irrelevant or unnecessary.(o) This power is given, or rather the duty is imposed, in very absolute terms, but it has nevertheless to be exercised with great caution. There is no duty more delicate for a judge than that of dictating to a party how he is to frame his pleading, or of restricting him as to what he may set forth. The power is therefore not to be exercised except in clear cases of irregularity. But it is some-

(m) Where there has been no revival the alterations on the pursuer's condescendence should be made on the original petition, and transferred to the certified copy, in both cases keeping

them distinct from the original statements.

(n) *Reid v. Meux*, 17th Dec. 1861, 24 D. 221.

(o) 16 & 17 Vict. c. 80, § 4.

times useful, especially where a party introduces personalities against his opponent or others, or otherwise grossly abuses the forms of process.

**7. Closing Record.**—The last proceeding at the meeting is to “close the record.” This is a solemnity. The record is closed by the Sheriff writing on the interlocutor sheet the words “record closed,” and signing and dating the same. The consent of the parties to this proceeding was formerly, but is not now, required. Indeed it seems competent and necessary for the Sheriff, if required, to close the record though one of the parties should be absent, if he be absent without sufficient cause. The Act of Sederunt of 1839, by a provision (§ 45) still in force, requires the Sheriff as soon as the record is closed to initial all the alterations or additions which may have been made on the margins of the papers before closing.

**8. Procedure after Closing Record.**—At the time of closing the record the Sheriff is directed by the Act of 1876(*p*) to ask the parties whether they renounce further probation. This is done in the Court of Session, and there may possibly be cases in the Sheriff-Court in which it will be a useful question to ask. If the parties are ready to renounce farther probation they sign a minute to that effect on the interlocutor sheet, which the Sheriff follows up (in closing) with a finding to the same effect, and with an order to debate.

In general, however, Sheriff-Court causes involve disputed fact, and probation will not be renounced. The Sheriff will then consider whether to allow proof at once or to appoint a debate; but before taking up this point, it is necessary to consider the rules as to the production of documents referred to in the pleadings.



### Section VIII.—OF PRODUCING AND RECOVERING DOCUMENTS FOUNDED ON IN THE RECORD.

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| <p>1. <i>Documents in the Parties' Possession.</i><br/>         2. <i>Diligences to Recover Documents.</i><br/>         3. <i>What Documents Recoverable.</i></p> | <p>4. <i>Recovering Documents before Pleadings Lodged.</i><br/>         5. <i>Mode of Carrying out Diligences.</i></p> |
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**1. Documents in the Parties' Possession.**—The law obliges parties having in their possession documents, books, or papers, on which they found in their pleadings, to produce them either along with the pleadings themselves or at latest at the record being closed.(a) There used to be a difficulty in interpreting this rule,(b) so as to distinguish between two classes of documents which are distinct enough in themselves—between those documents, on the one hand, which are themselves grounds of action or defence, and which (on their signature being admitted) of themselves establish the existence or discharge of the claim sued on,—and those documents, on the other hand, which are only to be used as part of a general proof, such as might be laid before a jury. This difficulty was serious, because the penalty for not producing the documents at the proper time was the being unable to produce them at all. It has been got over by the Act of 1876. This Act makes it imperative on each party to produce, at or before the closing of the record, all documents which are specially mentioned in his pleadings and which are in his hands. Other documents, it says, may be produced at the proof, though the Sheriff may order their production at any earlier stage of the cause.(c) This

(a) A. S., 10th July, 1839, § 51.

(b) *Borthwick v. Lord Advocate*, 5th Dec. 1861, 24 D. 130; and *Kelley v.*

*Robinson*, 16th Nov. 1864, 3 M. 53.

(c) 39 & 40 Vict. c. 70, § 22.

power should be sparingly exercised, as unless the documents are essential to the understanding of the relevancy of the case, or are such that the party asking them has an interest in them sufficient to give him right to call on his opponent to exhibit them, it is not very fair to make a party show a portion of his proof without at the same time giving him the opportunity of showing the whole. If a party fails to produce any document "timeously," the Sheriff is empowered to order or allow him to produce it at any time before judgment, upon such terms as to expenses or further proof, as may be right. This will cover the case of a party either failing to produce, at or before the closing of the record, a document specially mentioned in his pleadings, or failing to produce during the proof a document essential to it. Except along with a pleading, or at the closing of the record, or during the proof, no party can make productions without special leave. Should a party who is ordered to make a production fail to do so, he is held "as confessed" on the point concerned, that is, it is held that the document if produced would establish what the adversary says it would establish.(d)

**2. Diligences to recover Documents.**—If the documents on which a party founds are not in his custody or power at the time of lodging his original pleadings, the Act of Sederunt of 1830 (§§ 23 and 33) which still regulates this matter, directs him to state where they are, and empowers him then to ask for a "diligence" to recover them. After he has lodged his final pleadings, if they are still not in his custody or power, he must take a diligence to recover them (§ 51).

(d) *Caledonian Railway Co. v. Orr*, 5 Stour., 10th March, 1870, 9 M. 7th June, 1880, 17 D. 812; *Strachan* 116.

The object of forcing him to take a diligence at this stage is, that the opposite party may see before the record is closed all the documents on which the other party founds in his pleadings. If the party requiring them neglects to recover them at this time, when he is directed to do so, the opposite party will have right to object to his doing so afterwards, except upon such conditions as to expenses or further proof as the Sheriff may think right.(e)

**3. What Documents Recoverable.**—The right of a party to ask for a diligence before the record is closed is limited to one for the recovery of those documents on which he founds in his own pleadings. There is no authority given him to ask for a diligence to enable him to recover documents on which his adversary alone founds; and this is quite unnecessary, because if the opposite party do not produce or recover them he loses the benefit. And before the record is closed a party will not be allowed a diligence to recover documents wanted by way of proof, because the Sheriff has a discretion to refuse the diligence, and he will certainly do so, seeing that another opportunity is allowed at a subsequent stage for recovering such documents.(f)

**4. Recovering Documents before Pleadings Lodged.**—The Act of Sederunt of 1839 contains no provisions for granting diligences in certain circumstances where the Court of Session has a discretion to do so. In that Court, where a party desires to found on writings which are not within his own reach, and which his adversary does not produce because he does not found on them, there is a discretionary power of

(e) 39 & 40 Vict. c. 70, § 22.

(f) A. S., 1839, chap. ix.—Proof and Circumduction.

giving a diligence to recover the writings before forcing the pleadings to be lodged. The rules which the Court of Session follow in exercising this discretion are not very clearly laid down; but while a party is not allowed to use this diligence for the purpose of fishing for documents to see if they will afford him any ground of action or defence, and while no general rule is followed, it seems that he may get the diligence where his object is only to bring forward his statements in a specific form.<sup>(g)</sup> These rules reduce to a minimum the power of granting diligences to recover documents to be founded on, before the relative pleadings are lodged. In fact, they scarcely allow of its being exercised at all before the first pleadings are lodged, and therefore limit it to the case of the diligence being required before revival or before closing. When the rule is so reduced it comes very near to the powers conferred on the Sheriff by the Act of Sederunt, but as it is one which the Court of Session exercise in virtue of the common law, the Sheriff also could exercise it in the necessary case, and I have seen instances where its use has been proper and beneficial.

**5. Mode of carrying out Diligences.**—When diligences are granted, they are carried out under the same rules as commissions to take other evidence. The only difference is, that the party craving the diligence first lodges a specification, stating the writings he wants, and that the commission is then granted to him to recover them, or such part of them as the Sheriff may think fit. The havers are cited like witnesses, and a copy of so much of the specification as concerns each is served on him at the time of citing. Their examination proceeds in the same way as the examination of a witness

<sup>(g)</sup> *Dickson on Evidence* (2nd ed.) § 1338, note 4.

except that it is limited to the questions whether they have the documents called for, or have any knowledge of what has become of them. If the havers refuse to produce the documents, the objection is dealt with in the same way as the objection of a witness to answer.

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### Section IX.—OF THE PROOF.

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| 1. <i>Of Allowing Proof.</i>               | 11. <i>Witness objecting to Produce or Depone.</i> |
| 2. <i>Form of Order for Proof.</i>         | 12. <i>Evidence of Bankers.</i>                    |
| 3. <i>Precognition of Witnesses.</i>       | 13. <i>Fixing Witnesses' Expenses.</i>             |
| 4. <i>Citation of Witnesses.</i>           | 14. <i>Recalling Witnesses.</i>                    |
| 5. <i>Proceedings at Diet for Proving.</i> | 15. <i>Recording the Evidence.</i>                 |
| 6. <i>Witnesses examined separately.</i>   | 16. <i>Adjourning Proof.</i>                       |
| 7. <i>Oath or Affirmation.</i>             | 17. <i>Declaring Proof Closed.</i>                 |
| 8. <i>Examination in initialibus.</i>      | 18. <i>Additional Proof.</i>                       |
| 9. <i>Examination in Chief and Cross.</i>  | 19. <i>Proof in Replication.</i>                   |
| 10. <i>What Questions competent.</i>       |  |

**1. Of Allowing Proof.**—At the closing of the record the Sheriff appoints the parties to be heard (upon the merits of the case and on their respective pleas); or where he deems proof to be necessary, appoints a diet for proof on an early day.<sup>(a)</sup> This places on the Sheriff the duty of looking at the record, with the view of seeing whether there are materials for disposing of the case without proof, or whether a proof is necessary. If there be room for doubt he will send it to the debate roll; but if there be no room for doubt that a proof is requisite, it is very unnecessary to send the case as a matter of routine to the debate roll.

(a) 39 & 40 Vict. c. 70, § 23. As to "renouncing probation," see *supra*, p. 160 art. 8.

On closing the record it is convenient to ask the parties what they think on this point; and on hearing their view the Sheriff will generally be able to decide at once whether to order a debate or to allow a proof. The continuing of the case on the roll, in order that parties may be heard on some future day as to what may be done next, is not contemplated by the Statute. If the Sheriff appoint a debate on the relevancy, the proceeding is the same as in a debate after a concluded proof, and the little that requires to be said on the subject will be said afterwards. If, either with or without a debate, he allow a proof, the form of order requires consideration.

**2. Form of Order for Proof.**—"When a proof is allowed in cases in which no averments are made by the defender, the proper interlocutor is to 'allow the pursuer a proof of his averments, and to the defender a conjunct probation;' but when the defender makes averments, and both parties are allowed a proof, a form of interlocutor not unusual in such a case—viz., to allow both parties a proof, and to either party a conjunct probation, is erroneous and misleading. In such cases the proper form of interlocutor is, 'allow both parties a proof of their respective averments, and to the pursuer a conjunct probation,' because the defender is bound to lead his conjunct probation when he leads his proof in chief. After the pursuer has led his proof in chief, and the defender his conjunct probation and proof in chief, the pursuer is entitled to a probation conjunct to the defender's proof in chief; but after that the defender is entitled to no further proof, unless he can show that proof has been led in the pursuer's conjunct proof of such a nature as entitles him to a proof in replication, in which case he must apply to the Court for leave to

lead such proof in replication, and must show cause why it should be allowed.”(b)

It seems competent, and is a common practice, for the pursuer (if he thinks fit) to go into his conjunct probation at the time of leading his proof in chief; and it would appear that the practice ought to be encouraged, as it may save the defender from having to ask proof in replication.(c) If the pursuer, however, elects not to go into his conjunct probation until after the defender has led his proof, the pursuer must then be strictly prevented from trying, under the guise of leading conjunct probation, to introduce additional proof in chief.(d) Where the defender merely makes averments in explanation, but has no separate statement of facts, it seems unnecessary to allow the pursuer in express words a conjunct probation. In such a case he can seldom require two opportunities for leading his proof, and if both parties be allowed “a proof of their respective averments” he has as good authority for leading conjunct probation with his proof in chief, as a defender usually gets.

If part of the case only is relevant to go to proof, that part should be distinguished by the interlocutor.(e) It is sometimes, however, not advisable to endeavour to do this, as it may involve the giving of a judgment on a partially disclosed case. In such cases, as well as in cases where the whole relevancy is doubtful, it is customary to allow a proof “before answer,” which has the

(b) *Per* Lord Justice-Clerk Inglis in *Magistrates of Edinburgh v. Warrender*, 11th Nov. 1862, 1 Macph. 18; *Sellar's Forms*, vol. i. p. 262. For the mode of applying for proof in replication see *infra*, art. 18.

(c) *Gairdner v. Young*, 10th Dec. 1874, 2 R. 173.

(d) *Dick & Stevenson v. Mackay*, 21st

May, 1880, 7 R. 778.

(e) In practice this is only done when the part not allowed to go to proof is considerable. If the great bulk of a case is relevant, an interlocutor allowing a proof of it is not understood to mean that every word is relevant; and objections to the admissibility of particular parts of the evidence remain open.

effect of reserving entire every question of law and relevancy raised on the record. This form of interlocutor does not however reserve questions as to the competency of evidence; and if in any case it should be found desirable to take parole evidence first and then judge of its competency afterwards, the order for proof should be specially framed to make that clear.(f) Otherwise it will only be in the case of the record making it clear that the question reserved was as to the competency of parole evidence, that a proof "before answer" will be held to reserve it.(g) It seems, however, that for the mere purpose of keeping the relevancy open, the use of the words "before answer" is in the Sheriff Court unnecessary. As appeals now open up every question, the only person whom the words could possibly affect would be the judge who allowed the proof; and if, when a case came to be debated after the proof, he came to think it irrelevant, it would not be very reasonable to expect him, because he had not been asked at the closing of the record to apply his mind to the question of relevancy, or expressly to reserve it, to pronounce a judgment which he would know to be wrong, and would believe would be immediately recalled.

When proof is allowed *prout de jure*, it means that parole proof, and every kind of evidence that might be laid before a jury, is to be admitted. When proof *habili modo* is allowed, it is understood to mean that the whole, or a part of the proof, to be ascertained in the course of leading it, is to be limited to the writ or oath of the party's opponent.(h) These

(f) *Robertson v. Murphy*, 7th Dec. 1867, 6 Macph. 114; *Haldane v. Speirs*, 7th March, 1872, 10 Macph. 537; *Macvean v. Maclean*, 8th March, 1873, 11 Macph. 506.

(g) See Mackay's Court of Session

Practice, vol. ii., p. 15, for a full and learned discussion as to the meaning of the words proof before answer.

(h) *Gray v. Scott*, 9th Jan. 1868, 6 M. 197.



expressions in allowing proof, are, however, somewhat antiquated, and it is better for the judge to embody his meaning in the English language.

In the order for proof it is unnecessary to insert a warrant to cite witnesses and havers; because the Act of 1853 makes a certified copy of the order itself a sufficient warrant for all such citations.(i) For the sake of convenience, however, in allowing the clerk to issue printed forms of diligence for citing, such a warrant is still frequently inserted.(j)

When the claim made in the action is in amount above £40, the time for commencing the proof should be fifteen days at least after the date of allowing it. This provision is made in order to give time to either party to remove the case to the Court of Session for jury trial. It is so seldom made use of that in practice the interval (if the proof can be taken earlier) is not allowed unless it be asked.(k)

The place for taking the proof is always specially mentioned in the interlocutor fixing it. This is usually the ordinary court-house, but there seems nothing to prevent the proof being taken, in any emergency, at any place within the jurisdiction, so long as the public is not excluded; and in this way the examinations of aged and infirm persons are often taken at their own houses, to save the necessity of issuing commissions.

**3. Precognition of Witnesses.**—In all cases depending on fact, the witnesses should be precognosced at the earliest stages. There are few who have not seen instances of the inconvenience produced by delaying the ascertainment of the facts till after

(i) 16 & 17 Vict. c. 80, § 11.

(j) Sellar's Forms, vol. i. p. 264.

(k) A. S., 10th July, 1839, § 126;  
Ritchie v. Ritchie, 22nd Oct. 1870, 9 M.

43, shows that this provision applies only where the claim is *ex facie* over £40. Proofs to lie *in retentis* are expressly excepted.

the pleadings were closed. The expense, however, of precognosing witnesses not being allowed in practice, as a charge against an opponent, unless an order for proof has been pronounced, precognitions generally take place at this stage.<sup>(l)</sup> But as the regulations provide that, if an interlocutor be eventually pronounced allowing a proof, the cost of the precognitions may be allowed, though they may have been taken before its date, or even before the action be raised, it is well not to delay taking them.<sup>(m)</sup>

In taking precognitions the agent must take care that he does not examine the witnesses in presence of each other. If he does, the value of the evidence will be so much destroyed that in delicate cases it will be held to turn the balance against him. Precognosing witnesses in presence of each other used indeed to be fatal. Now, however, this course would not be followed. The evidence would be recorded, but probably full effect would not be allowed to it. It is therefore always a piece of gross imprudence and mismanagement (as Lord Jeffrey has said) to precognosce witnesses in this way; and if doing so has in any way tended to imperil the case of the opposite party, it may even lead to the evidence being altogether rejected.<sup>(n)</sup> The witness who is being precognosced must not be put on oath;<sup>(o)</sup> and it appears questionable whether he should be asked even to sign his statement.<sup>(p)</sup> In criminal cases a witness who has been precognosced on oath

(l) A. S., 4th Dec. 1878, § 7. At one time this was the only stage at which a precognition could well take place. Prior to 15 & 16 Vict. c. 27, § 1, it was a fatal objection to examining a witness that he had been precognosced after he was cited.

(m) A. S., 4th Dec. 1878, § 7.

(n) Reid v. Duff, 18th Feb. 1843, 5

D. 656, Dickson on Evidence, §§ 1751, 1752. Telling one witness what another has said or will say, and reading the pleadings to a witness, are similarly objectionable.

(o) 5 & 6 Will. IV. c. 62, § 13.

(p) Duncan v. Thomson, 16th July, 1834, 12 S. 935.

may insist on having his deposition destroyed before giving his evidence, so that he may not be deterred from speaking the truth by the fear of contradicting any former statement. (g)

**4. Citation of Witnesses.**—Witnesses may be cited either (1) by a Sheriff-officer in the mode hitherto used, or (2) by a notice sent by registered letter under the Citation Act of 1882.

A certified copy of the interlocutor fixing the diet of proof (or of the portion of a wider interlocutor relating to that matter) or a formal diligence issued by the clerk, is a sufficient warrant to any Sheriff-officer, acting within his own sheriffdom to cite witnesses and havers at the instance of either party to attend the proof. If witnesses from another sheriffdom require to be cited, the certified copy must be indorsed by the Sheriff-Clerk of the other sheriffdom, and thereupon an officer of that sheriffdom cites. (r) If a witness or haver is required to produce documents, it is desirable that the officer should at the same time serve upon him a schedule specifying what documents will be asked from him, so that the witness may bring them with him. There is no specified period of notice which a witness can claim, but it is advisable to cite at least forty-eight hours before the time for taking the proof; because if that amount of notice is given, and the witness does not attend, he is liable to have a fine of two pounds summarily imposed upon him, unless "reasonable excuse be offered and sustained by the Sheriff." Moreover, in that case he is liable, on failing to attend, to have letters of second diligence issued against him, under which he may be apprehended. (s) The

(g) 2 Hume's Commentaries, 381.

(r) 1 & 2 Vict. c. 119, § 24; 16 & 17 Vict. c. 80, § 11.

(s) The "second diligence" is issued by the clerk, after the Sheriff has granted warrant for it and fixed the

penalty. Under it the witness may be apprehended and imprisoned until he find caution to appear when required, or pay the penalty named. A. S., 10th July, 1839, § 75, Sellar's Forms, vol. i. pp. 141, 275.

statutory provisions on this point do not specially take into account that forty-eight hours may possibly be too short notice for parties resident beyond the sheriffdom; but the Sheriff must take that into consideration when considering what is a reasonable excuse.(t)

The authority for citing through the Post-Office is the same as that for citing by an officer of court, and the proceedings are similar to those for sending a citation on a petition. If the officer send the registered letter, he will send in it his usual citation, and if a law-agent send it, it is intended that he should sign the citation. If the citation be that of a witness residing within the sheriffdom, it will be an officer or enrolled law-agent of it who will act, and in the case of an indorsed warrant, it will be the officer or agent of the indorsing sheriffdom. The notice required will be twenty-four hours in addition to the forty-eight, or seventy-two hours in all from the time of posting. If the letter be returned to the Sheriff-Clerk, the Sheriff may order a new citation either in the same method or in the old method, or if he is satisfied that the letter was tendered at the proper address and refused by the witness, he may, without waiting for the diet for proving, issue second diligence to compel his attendance.

No higher fees of citing than those of postal citation are allowed in any case, unless the Sheriff is of opinion that citation in the new method was not expedient in the ends of justice.(u)

It is now no objection to a witness that he has appeared without citation.(v)

##### 5. Proceedings at Diet for Proving.—The proof proceeds

(t) 16 & 17 Vict. c. 80, § 11.

p. 125.

(u) 45 & 46 Vict. c. 77, and *supra*,

(v) 15 & 16 Vict. c. 27, § 1.

upon the day appointed, and it cannot be prorogated of consent of the parties ;(w) though it may upon cause shown.(x) If by accident it be taken on a prior day, the presence of the parties implies their consent, and prevents either of them from afterwards objecting.(y) If the party who has been appointed to begin the proof should fail to appear, the Sheriff must either decern against him by default, or allow the opposite party (if he wishes it) to go on with his evidence, or if sufficient cause be shown, he can adjourn the proof, finding the absent party liable in expenses. If a party to whom a conjunct probation has been allowed is absent, the proper course is either to let the leading party to go on with his proof, and then close the proof, or to decern against the party in default. If a party appear but tender no evidence, the opposite party is allowed to lead his. When one party has led proof, but the other (whether present or absent) has not, the case should be afterwards debated and disposed of on the footing of the party who has led no proof having none to lead. A party who (in the absence of the opposite party), has elected to go on with his proof, cannot fairly ask decree after that simply on the ground of default, but can only ask that the Sheriff hear him on the merits, and give decree according to whether the case is made out or not. It is seldom, however, that proof is led in the absence of the opposite party, and indeed it is done only when some reason exists for preserving the evidence. If all the parties fail to appear, the Sheriff is bound, unless some sufficient reason appear to the contrary, to dismiss the action.(z) In any case, a decree pronounced against a party who has failed to attend a proof, is a decree by default.

(w) 39 &amp; 40 Vict. c. 70, § 19.

1 Irv. 288.

(x) 16 &amp; 17 Vict. c. 80, § 10.

(z) 39 &amp; 40 Vict. c. 70, § 20. The

(y) *M'Kay v. Ross*, 23rd Sept. 1853, principal Sheriff can reponne.

**6. Witnesses examined separately.**—The witnesses are inclosed and examined one by one in such order as the agents select. None of the witnesses are to be present during the examination of the others without leave obtained beforehand from the Sheriff. It was at one time a fatal objection to a witness that he had been so present, but the Court has now discretion to admit the witness if it appear that his presence was not the consequence of culpable negligence or criminal intent; that he has not been unduly instructed or influenced by what took place during his presence; and that no injustice will be done by his examination.(a)

**7. Oath or Affirmation.**—When the witness is adduced he is put upon oath, or he makes an affirmation. Should he not object to take the oath, the ordinary form of it is always to be used unless it be made to appear that that form would not be binding on the conscience of the witness. If the witness considers the ordinary form to be binding it is absurd to ask him if he considers another form to be more binding. Roman Catholics, therefore, are now sworn in the usual way.(b) Where the witness is unwilling from conscientious motives to be sworn, it is lawful for the judge to allow him to take a solemn affirmation or declaration.(c) As, however, the power to administer

(a) 3 & 4 Vict. c. 59, § 3. In Kirkpatrick on Evidence, 1882, the rules as to the matters treated in this and the following articles will be found clearly stated.

(b) M'Gavin, 11th May, 1846, Arkley, 67. Jews, it may be added, are sworn with the head covered, and holding the Old Testament between the hands; and Mohammedans are sworn on the Koran. Dickson on Evidence,

§ 1970.

(c) 23 & 29 Vict. c. 9, § 2. The affirmation as adapted to a proof may run: "I do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and that I will tell the truth, the whole truth, and nothing but the truth." An affirmant, it seems, is not bound to hold up his right hand while taking the affirmation.

and duty to take the oath and affirmation are co-extensive, the distinction between the two need not be noticed further.

Children under twelve years of age (when admissible) are not sworn. Children above fourteen, in general, are sworn; when they are between twelve and fourteen the judge uses his discretion as to whether they appear to understand the nature of an oath. If they do not, but appear to understand the nature of the obligation to be truthful, they are examined after a due admonition. If the child is so young as not to understand the nature of this obligation, it should not be examined at all.(d)

The words of the usual oath oblige the witness to tell the truth, the whole truth, and nothing but the truth; but either of the two last parts may be omitted. The obligation to tell the truth is an obligation to tell the whole truth so far as the witness is bound by law to disclose it. Accordingly, a Roman Catholic priest who took an oath to tell the truth and nothing but the truth was not thereby held as excused from telling the whole truth, even though the matter which he refused to tell had been communicated to him confidentially in the course of his duty.(e) On the other hand, an oath to tell the whole truth does not oblige a witness to disclose matters the knowledge of which he is legally entitled to withhold.

**8. Examination in initialibus.**—The witness, having been sworn, may be examined "*in initialibus*," if the party against whom he is adduced desire it. In this examination the witness is examined as to his relationship to the party adducing him; his interest in the cause; or as to his having acted as

(d) Dickson on Evidence, § 1676.

(e) *M'Lauchlin v. Douglas*, 17th Jan. 1863, 4 Irvine, 273.

agent in it. He may also be asked whether he has been instructed what to say; whether he has received any good deed or promise for what he has to say; or whether he bears malice against the opposite party. When this examination is required, it is conducted by the judge or by the party against whom the witness is called. It serves little purpose and is not often used.(f)

**9. Examination in Chief and in Cross.**—The examination in chief then begins. The agent who begins it continues that examination throughout without interruption from any quarter (unless when an objection is taken to the legality of the question) until he exhaust the examination. After this, the agent on the opposite side may cross-examine without interruption until he exhaust his cross-examination. At the same time, he may examine the witness, not only in cross, but *in causa*.(g) Then the agent who examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in cross-examination, unless with permission of the Court.(h) The agent who cross-examined has no right to a second cross, but the Court may either allow him to put any questions proper for clearing up matters which the re-examination may have left in doubt, or, on his suggestion, may put the questions from the Bench.(i) In the case where the agent who cross-examined has also examined the witness *in causa* on new matter, it would

(f) *Ersk.* iv. 2, 28; 3 & 4 *Vict. c.* 59, § 2; 15 & 16 *Vict. c.* 27, § 1; *H.M. Advocate v. Reid*, 11th April, 1883, 2 *Coup.* 415.

(g) 3 & 4 *Vict. c.* 59, § 4.

(h) *A. S.* (regulating jury causes), 16th Feb. 1841, § 28.

(i) It is sometimes maintained that an agent has, as matter of right, power

to make a second cross-examination; but no authority can be quoted in support of the contention. The rules given in the text are those followed in jury causes in the Court of Session (*MacKay's Practice*, vol. ii. p. 53 *et seq.*); and as these rules are founded on what is believed to be right and proper, they are binding on inferior courts.



seem right for the Court to allow him here to re-cross, so as to clear up anything that the opposite party's re-examination may have left doubtful. When the agents on both sides have ended, the Court may put any questions that suggest themselves. This is also sometimes done in the course of the examination from the Bar.(j)

**10. What Questions competent.**—The questions to be put to the witnesses must in themselves be relevant; that is, they must be of such a kind that it may reasonably be anticipated that the answers to them will throw light on the matters at issue, and establish, or help to establish, some point in favour of the pursuer or the defender, as the case may be. And they must farther be of such a kind as the opposite party might reasonably anticipate would be asked, either from the general nature of the case or from the special matters set forth on the record. The rules on all these points are the same in the Sheriff Courts as in the Court of Session.(k)

It is a general rule that leading questions—that is, questions which suggest the desired answer—are not to be put. The rule, however, is to be applied reasonably. In the introductory part of the examination, where the agent is going over matters on which there can be no doubt what the witness will say, it would be a waste of time to prohibit leading questions. When, however, the agent comes, in examining his own witness, to the material part of the evidence, leading questions are prohibited. In cross-examining they are per-

(j) Dickson on Evidence, § 1977.

(k) The notion (Mackay's Practice, vol. i. p. 205) that certain kinds of evidence, such as "the indirect evidence of *comparatio literarum*, or of experts,

is not competent in the Sheriff Court," is long since exploded. Any evidence which may be laid before a jury may be led before a Sheriff. This is matter of every-day practice.

mitted. The rule is reversed in cases where the witness shows great unwillingness to answer the party who has adduced him, and great willingness to assist the opposite party. Leading questions may always be allowed at the end of an examination, after the questions have been put in a general form, and the answers recorded; but when they are allowed the deposition should be taken down in the form of question and answer.

It is just as incompetent to mislead a witness as to lead him; and it is therefore improper to put questions to him which imply that previous questions have been answered by him in a different way from what he has actually done, or which insinuate that the facts are otherwise than as he believes them to be, or which assume as true facts which have neither been admitted nor proved.

It was laid down as a rule at one time that a party could not contradict or try to discredit his own witness; but that rule, if it ever was well-founded, is now exploded. It is now competent for either party to ask a witness if he ever made a statement differing from his evidence, and if he deny it, to prove in the course of the proceedings that he had done so.<sup>(l)</sup> Whenever, indeed, it is intended to destroy the credit of a witness, by afterwards leading evidence contradictory to his statements, it is necessary that he should be examined on the special points on which it is proposed to contradict him.<sup>(m)</sup>

Witnesses must be examined only in regard to facts; that is, in regard to what they have seen, or (in certain strictly limited

(l) 15 Vict. c. 27, § 3; *Gall v. Gall*, 23rd Nov. 1870, 9 Macph. 177. This rule is not applicable to statements made in precognition; *Emalie v. Alexander*, 20th Dec. 1862, 1 M. 209; though an exception has been allowed

in special circumstances; *H.M. Advocate v. Robertson*, 3rd Nov. 1873, 2 Coup. 495.

(m) *Ross v. Fraser*, 13th May, 1863, 1 Macph. 783; *Gall*, quoted in preceding note.

cases) heard of the matters involved in the action. They cannot be asked such questions as whether they know that a thing happened, because their knowledge may be founded on things which are not evidence. And in general they must not be asked as to opinions, or still less as to matters of law. For this reason, such questions as whether the driver of a carriage was to blame for an alleged collision, are incompetent, because they involve matters of law or opinion as well as of fact.<sup>(n)</sup> The only cases in which questions as to opinion can be put are when men of skill are examined; and the only cases where questions of law can be put are where foreign lawyers are examined as to the law of their own country. In some cases it is competent to ask a witness what his impression was at the time. For example, if something was seen in circumstances that might be consistent with either of two states of a fact, the witness may be asked what his impression was at the time; but it is only an impression as to a matter of fact that can be asked for. An impression involving an element of opinion is worse evidence than the opinion itself, in so far as to take it would be to take the first crude idea which had come into the head of the witness in circumstances where his deliberate judgment would be rejected. A witness may be allowed, at the discretion of the judge, to make use of notes made by himself at or about the time the events occurred, to refresh his memory as to details, and such notes often give great additional value to the evidence. Notes made recently, and still more notes made with the assistance of the parties or their agents, are inadmissible.<sup>(o)</sup>

#### 11. Witness objecting to Produce or Depone.—When a

(n) *Gunn v. Gardiner*, 1820, 2 Mur. 197; *Dickson*, § 1991

(o) *Dickson*, § 2005.

witness called on to produce documents objects to do so on the ground of confidentiality, or of his having some right of hypothec over them, or right of property in them, or on any other ground, he must state his objection to the presiding Sheriff, who must dispose of it in the first place. When a Sheriff-Substitute decides against the objection, the witness may appeal to the principal Sheriff. This is done by taking the appeal at the time in open court, the Sheriff-Substitute making a minute of the occurrence. Upon this being done, so much of the process as is necessary for the disposal of the appeal must be transmitted to the principal Sheriff. The case, on all points not connected with the appeal, goes on as if the appeal had not been taken.<sup>(p)</sup> Refusals to give oral evidence on similar grounds are disposed of as nearly as may be in the same way.

**12. Evidence of Bankers.**—Under the Bankers' Books Evidence Act of 1879, bankers are put in a specially favoured position as to giving evidence in actions to which they are not parties. A copy of an entry in their books is, in such actions, received as *prima facie* evidence of the entry and its contents. There must be proof either orally or by affidavit that the copy is correct, that it is taken from one of the ordinary books of the bank, and that the entry was made in the ordinary course of business. In regard to anything which can be proved in this way, bankers and their officers are not compellable to attend, unless by order of the Sheriff issued for special cause. A special order is likewise necessary to entitle a party to inspect a banker's books, and this order must be

(p) 16 & 17 Vict. c. 80, § 18. The right of appeal allowed by this provision does not appear to be taken away by the Act of 1876, Part vi., which

seems to deal only with appeals at the instance of a pursuer, defender, or other party to the action, and not with appeals at the instance of a witness.

served on the bank at least three clear days before the time of inspection, unless the Court otherwise direct.(g)

**13. Fixing Witnesses' Expenses.**—The Sheriff has power to order to the witnesses such expenses as may seem just, which must be paid by the party adducing him or by his procurator.(r) This may, if the witness ask it, be fixed at the time of his examination, and a decree for the amount is sometimes pronounced and indorsed on the citation. The expenses of witnesses, however, are usually paid by the agent at the end of the trial, and dealt with afterwards by the auditor in taxing the account. The allowances are regulated by Act of Sederunt.(s) A witness does not appear to have in Scotland a right to demand payment before attending, but if such a demand were made and refused in circumstances where it would have been reasonable to have granted it, the Sheriff would probably not impose any penalty for non-attendance.

**14. Recalling Witnesses.**—After a witness has been dismissed it used to be incompetent to recall him, excepting where a party who had examined him in cross desired in the course of his own proof to examine him in chief; but it is now in the discretion of the judge to permit any witness who may have been examined in the course of the proof to be recalled on the motion of either party.(t) The matter is left entirely to the discretion of the Court.(u)

**15. Recording the Evidence.**—The evidence may be

(g) 42 Vict. c. 11. "Judge of County Court" in this Act must include Sheriff.

(r) A. S., 10th July, 1839, § 74. Agents on the Poor Roll are exempt.

See *infra*, "Poor's Roll."

(s) A. S., 4th December, 1878.

(t) 15 & 16 Vict. c. 27, § 4.

(u) Robertson v. Steuart, 27th Feb. 1874, 1 R. 532.

recorded either in long-hand-writing, or in short-hand. In whichever way it is taken, the substance of the record is the same. The Statute of 1853, which regulates this matter, directs the Sheriff to take a note of the evidence, in which he is to set forth the witnesses examined, and the testimony given by each.(v) The witnesses are usually set forth by giving their names, ages, occupations, and residences. The testimony is not to be recorded by way of question and answer, but in the form of a narrative. This is not understood to prevent the Sheriff from recording any particular question and answer as they are put, if he thinks it desirable to do so. In his note the Sheriff is also to mention the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received. It has been recommended that the note should bear who are present to represent the parties. When the note is completed it is forthwith lodged in the process, after being authenticated by the Sheriff or Sheriff-Clerk.(w) The Sheriff-Clerk marks and inventories the documents admitted in evidence, and also separately any documents tendered and rejected.

If the evidence is taken in long-hand it must be written by the Sheriff himself, he having been instructed not to dictate to a clerk, except when unavoidably prevented from writing. The notes of the evidence of each witness must also be read over to, and signed by him, before he is dismissed.

Evidence, however, is now usually taken in short-hand, which is a great improvement as regards speed, economy, and

(v) 16 & 17 Vict. c. 80, § 10.

(w) *Cook v. Duncan*, 2nd Dec. 1857,  
20 D. 180. The note often mentions,

for the guidance of the auditor, the  
number of hours the proof has lasted.

the better taking down of what the witnesses say. Under this form the Sheriff (on the motion of either party) appoints a writer skilled in short-hand, to whom he administers the oath *de fidei administratione*. He then dictates to the short-hand writer the evidence which he is to record, and a note of the documents adduced and any admissions made by the parties. The practice of allowing the short-hand writer to take down the evidence, without its being dictated to him, is against the statute, and is not a good one in itself, as it makes the proof unnecessarily prolix.(x) The expense of the short-hand writer is borne by the parties in the first instance equally. When the notes of evidence have been extended by the writer, and certified by him as correct, they form the record of the oral evidence in the case. In the Court of Session, where the evidence is never dictated, it is the presiding judge who certifies the correctness of the record;(y) but, in the Sheriff Court Act, the duty is thrown on the short-hand writer, and as he is the person who is really responsible for taking down and writing out correctly what is dictated by the Sheriff to him, it is better that it should be so. If the correctness of the notes be questioned, it is competent for the Sheriff to satisfy himself in regard thereto by the examination of witnesses or otherwise. If necessary, he may amend the notes.(z)

**16. Adjourning Proof.**—The Sheriff is prohibited from adjourning the proof except upon special cause shown, which is to be set forth in the interlocutor making the adjournment. The consent of the parties is not sufficient cause.(a) Some

(x) *Roberts v. Henderson*, 25th Oct. 1882, 20 S. L. R. (J. C.) 20; *Eadie v. Hunt*, 20th Oct. 1877, 15 S. L. R. 22.

(y) 29 & 30 Vict. c. 112, § 1.  
(z) 37 & 38 Vict. c. 64, § 4.  
(a) 39 & 40 Vict. c. 70, § 19.

good reason, independent of arrangement between the parties, must be shown to the Sheriff and recorded, before the adjournment can be made.(b) Such reasons may vary indefinitely, but as illustrations may be taken the cases of the absence of a material witness after due citation, and of either of the parties being taken by unavoidable surprise by the evidence led. If the Sheriff grant the adjournment, he may grant it on such conditions as to expenses as he thinks right, the power to grant or refuse implying the power to grant conditionally. The Statute does not direct the Sheriff to record a refusal of an adjournment. It is usually done, though it was probably intended to leave this matter solely to his discretion. If an adjournment be granted, it is contemplated that it shall be for only the shortest period possible, the Act directing that the proof shall be taken as nearly as may be continuously, and with as little interval as the circumstances or the justice of the case will admit.(c)

**17. Declaring Proof Closed.**—On the proof being concluded the Sheriff pronounces an interlocutor declaring the proof to be closed,(d) and immediately thereafter hears the parties. He may, however, on cause shown, allow one adjournment for a period not exceeding seven days, for parties to prepare for the debate, but that matter is left to his discretion, the statutory rule being that the debate proceeds at once.(e) Where documents have been referred to in the course of the proof, but the witness has not had them with him to produce, there seems no objection to introducing,

(b) 16 &amp; 17 Vict. c. 80, § 10.

(d) See 16 &amp; 17 Vict. c. 80, § 17, and

(c) 16 & 17 Vict. c. 80, § 10; *Meiklejohn v. Stevenson*, 22nd June, 1870, 8 Macph. 890.*Sellar's Forms*, vol. i., p. 264.

(e) 39 &amp; 40 Vict. c. 70, § 23.



of consent, a reservation empowering the production of the specified documents within this time.

**18. Additional Proof.**—After a proof has been regularly concluded, it is incompetent for the Sheriff who took it, to allow either, *ex proprio motu*, or on the mere motion of the parties, additional proof.(f) If additional proof be desired, the mode of applying for it is provided by the Act of Sedurunt of 1839. Section 83 provides that when a proof is reported and an interlocutor pronounced upon it (equivalent under the present forms to the proof being declared closed), no farther proof shall be allowed except upon very weighty reasons shown, and upon payment to the other party of such a sum for expenses as the Sheriff shall determine. This application must be made by a petition, which is particularly to set forth the facts to be proved and the witnesses who are to prove them.(g)

**19. Proof in Replication.**—In the mode in which proofs are taken under the Act of 1853, it is seldom that the pursuer or defender can have any ground to ask for a proof in replication. But it is still competent to allow it when a sufficiently strong case for doing so is made out.(h) The party applying for it must show that matters of fact have been brought out which he could not have anticipated. Strictly speaking, proof in replication is the proof which the defender is occasionally allowed to lead in reply to the pursuer's conjunct probation ;

(f) As to the power of the principal Sheriff in an appeal to allow additional proof, see *infra*.

(g) *Drain v. Scott*, 25th Nov. 1864, 3 Macph. 114 ; A. S., 10th July, 1839, § 83 ; *Brown v. Gordon*, 27th Jan. 1870, 8 Macph. 432.

(h) *Gairdner v. Young*, 10th Dec. 1874, 2 R. 173. Here the defender stated a counter claim, and the pursuer went in his conjunct probation, for the first time, into proof of his objections to it. The defender was allowed a proof in replication.

but the name is also applied to the proof which a pursuer who has not originally been allowed a conjunct probation may ask to be allowed to lead in reply to the defender's proof. In any case it is improper to allow proof in replication without strong grounds, and as proofs before the Sheriff Court should be conducted as nearly as may be as if they were before a jury, it is a sign that there has been some miscarriage, if it have to be allowed. It must be specially applied for, and the application should be in writing, and should set forth the facts to be proved and the witnesses by whom they are to be proved, in the same way as in an application for additional proof, to which it has much resemblance.<sup>(1)</sup>

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#### Section X.—OF THE DEBATE AND JUDGMENT.

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|-------------------------------------|--|
| 1. <i>Debate.</i>                   | 5. <i>Decerniture : Expenses.</i>                |
| 2. <i>The Judgment.</i>             | 6. <i>Correction of Errors in Interlocutors.</i> |
| 3. <i>Findings in Fact and Law.</i> |  |
| 4. <i>Decerniture : Merits.</i>     |  |

**1. Debate.**—The debate follows immediately on the proof being closed. If necessary, the debate may be adjourned for not more than seven days, but it is in the discretion of the Sheriff whether to adjourn it or not. Formerly, when a party absented himself from a debate, the practice was for the Sheriff to pronounce decree by default. Where, however, one party is absent, it is a better way to hear the other and make *avizandum*, and dispose of the case on the merits.<sup>(a)</sup> The pronouncing of

<sup>(1)</sup> *Strang v. Stewart*, 15th May, June, 1825, 4 S. (O.E.) 125 ; *Forrester v. Galbraith*, 17th Dec. 1829, 8 S. 266.

<sup>(a)</sup> See *Kennedy v. Watson*, 29th as to the competency of this course.

decree by default often does not advance the case, for the decree may be appealed against, and may be so recalled as to leave the case exactly where it was; whereas, if the Sheriff applies his mind to the case and pronounces judgment on the merits, material progress will have been made, and a party will have himself only to blame for losing his opportunity of giving the Court the benefit of argument on his behalf. If both parties absent themselves from the debate, the Sheriff, unless a sufficient explanation is forthcoming, dismisses the action.(b)

When a debate is ordered on the closed record, where no proof has been taken, either the case is sent to the Debate Roll, where the Sheriff-Clerk as a matter of course enrolls it for the first Court after the closing, or a special day and hour is appointed for the hearing.

The debate may always be dispensed with on the written consent of both parties.(c)

The proceedings at the debate are so simple that they require no explanation. In general the pursuer opens; the defender replies; and then the pursuer is allowed to notice any new matter which the defender may have brought forward. He ought to be confined to this; and if he be, the defender is not entitled to a second speech. If the burden of proof or of making out a defence lie on the defender, he may be called on to open, and then the whole order is reversed.

**2. The Judgment.**—The debate being concluded, the Sheriff either pronounces judgment at once, or takes time to consider the case. If he makes *avizandum*, judgment should be pronounced with the least possible delay.(d) If it is later than ten days in coming, the cause of the delay has to be noted

(b) 39 & 40 Vict. c. 70, § 20.

(d) 16 & 17 Vict. c. 80, § 5.

(c) 16 & 17 Vict. c. 80, § 5.

in a Book of Court, which is kept for recording cases, of which the custody is for the time given up by the Sheriff-Clerk to the Sheriff.(e) Whether the judgment be pronounced at once or after an interval, it is needless to say that it must in either case be embodied in writing.

In the judgment several things require attention. If proof has been taken, and the judgment proceed on it in whole or in part, it must set forth what the Court finds proved in point of fact and what it holds in point of law. Then the order or decerniture must, in definite language, dispose of the whole conclusions of the action, without going beyond them. The judgment, lastly, must settle the question of expenses. The judgment is authenticated by being signed(f) on each page. Marginal notes are also signed. If words are deleted, their number is mentioned before the last signature. There must be no interlineations and no erasures. If there be any of these, and the judgment thus wants due authentication on any material point, it will be liable to be set aside.(g) Lastly, it must be dated, and if the date of signing be different from the date of the oral pronouncing or of extending, it is the former which rules.(h) If it have been signed out-with the sheriffdom, it bears the date of its being received by the Sheriff-Clerk at the seat of the Court to which it belongs.(i)

Unless the grounds of the judgment sufficiently appear from the findings contained in the interlocutor, they must be set forth in a note appended to it and issued along with it.(j)

(e) 1 & 2 Vict. c. 119, sch. B.

(f) 1686, c. 3; *Smith v. M'Aulay*, 26th Nov. 1846, 9 D. 190.

(g) Erasures in immaterial parts, even in dates when they are not material, do not effect the validity. *Dowie v.*

*Barclay*, 18th March, 1871, 9 Macph. 726.

(h) *Cleland v. Clark*, 15th Feb. 1849, 11 D. 601.

(i) 39 & 40 Vict. c. 70, § 50.

(j) 16 & 17 Vict. c. 80, § 13.

**3. Findings in Fact and Law.**—The Sheriff's duty to pronounce findings in point of fact and in point of law is imposed by an Act of Sederunt of 15th February, 1851.<sup>(k)</sup> The rule there laid down is not superseded by the provision in the Act of 1853, requiring the Sheriff to set forth in the interlocutor, or in a note appended to it, the grounds on which he has proceeded. On the contrary, it is in force, and cases have been remitted, at great inconvenience to the parties, from the Court of Session to the Sheriff Court, to have the provisions of the Act of Sederunt complied with where they have been neglected.<sup>(l)</sup> So important, indeed, is the rule considered, that an objection on the ground of non-compliance with it cannot be waived.<sup>(m)</sup>

The provisions are—that the Sheriff shall, in any judgment proceeding upon proof, distinctly specify the several facts material to the case which he finds to be established by the proof, and that he shall express how far his judgment proceeds on the matter of fact so found, or on the matter of law, and shall state the several points of law which he means to decide. The distinction, easy enough to express on paper, is often by no means easy to carry out in practice, and it is not uncommon to see what are called findings in fact involve large assumptions in law.<sup>(n)</sup>

**4. Decerniture : Merits.**—The decerniture varies of course with the circumstances of each case. It must, in the first place, be clear and precise. Though clerical errors may be

(k) See App., Part I.

(l) *Glasgow Gas Light Company v. Glasgow Working Men's Total Abstinence Society*, 11th July, 1866, 4 Macph. 1041.

(m) *Melrose v. Spalding*, 25th June,

1868, 6 Macph. 952.

(n) In *Mackay v. Dick & Stevenson*, (H. L.) 7th March, 1881, 8 R. 37, and *Shepherd v. Henderson* (H. L.), 1st Dec. 1881, 9 R. 1, Sheriffs will find some instructive observations on this subject.

corrected within a certain short time,(o) it is incompetent after judgment has been issued to make material amendments;(p) and if it be confused and vague, there is no means of curing the defects except by a superior judge setting the judgment aside. A second judgment interpreting the first would be incompetent.(q)

In the next place, the decerniture must keep within the conclusions of the action. If it go beyond them—for instance, by giving decree for a larger sum than that concluded for—it may be set aside. In circumstances where it is competent to conclude alternately for a specified sum or for such other sum as may be found due, the decree, properly speaking, does not go beyond the petition when it gives more than the specified sum.(r)

The decree must, lastly, dispose of the whole of the conclusions. There are three modes in which this may be done:—(1) by decerning in terms of them (*condemnator*); (2) by assolzieing the defender from them when he is to be discharged altogether (*absolvitor*); (3) by dismissing them when the Court mean that the present proceedings have failed, but that no opinion is given on the merits. In one or other of these three ways the whole conclusions must be exhausted. The technical word “decern,” should be used in some part of the decree, in order to mark that the judgment may be extracted.(s)

### 5. Decerniture: Expenses.—At the time when the merits

(o) See *infra*, Art. 6.

(p) *Cuthil v. Burns*, 20th March, 1862, 24 D. 849. In the Court of Session a judgment is held as issued when pronounced from the Bench, though it may not have been signed.

(q) *Edingtons v. Astley*, 5th Dec. 1829, 8 S. 192.

(r) *Spottiswoode v. Hopkirk*, 17th Nov. 1853, 16 D. 59.

(s) *Infra*, as to Extracts.

of the cause are disposed of, the Sheriff is directed to determine the matter of expenses in so far as not already settled.(t) If the Sheriff by mistake neglect to do so, it has been held that the omission may be supplied before extract,(u) though a subsequent decision makes this very doubtful.(v) Perhaps the decisions may be reconciled on the view that while a purely accidental omission to carry out a settled intention to award expenses might be supplied, nothing like a reconsideration of the point could be permitted, so as to change what apparently was meant to give neither party expenses, into an award in favour of one of them. In the Court of Session, if the interlocutor on the merits is silent as to expenses, the point cannot be reopened.(w) The question may of course be expressly reserved.

**6. Correction of Errors in Interlocutors.**—Under the statutes of 1853 and 1876, any merely clerical error in a judgment may be corrected by the judge who pronounced it at any time, not being later than seven days from the date of such judgment;(x) or in the event of an appeal being taken, at any time before the transmission of the process to the Appeal Court.(y) It has apparently been intended by the Act of 1876 to provide that the Judge might correct an error at any time, till stopped either by extract, or by the trans-

(t) A. S., 10th July, 1839, § 62.

(u) Ranken v. Kirkwood, 18th Nov. 1855, 18 D. 31. Clarke v. Loos, 20th Jan. 1855, 17 D. 306.

(v) Drummond v. Bryden, 10th Dec. 1869, 8 M. 277. If the omission be discovered in time there seems nothing to prevent its being corrected as an error under the immediately following article of the text.

(w) Wilson's Tra. v. Wilson's Factor, 2nd Feb. 1869, 7 M. 457; Mackay's Practice, vol. ii., p. 545.

(x) 16 & 17 Vict. c. 80, § 20.

(y) 39 & 40 Vict. c. 70, § 34. This Statute uses the expression, "merely clerical or accidental error," but there seems here no extension of meaning beyond what the older Statute said.

mission of the process for an appeal, but the wording is too curiously constructed to make it safe to rely on this reading. The agent, therefore, should examine the interlocutor at once, and apply for the rectification of any clerical error that he may perceive. If such errors be not discovered till after the prescribed times, it is not clear that there is any remedy in the Sheriff Court. In the Court of Session, when such a thing occurs, a power is exercised of bringing back the process, even after it has gone to be extracted, and of pronouncing the judgment over again, but it is doubtful whether this could be done in the Sheriff Court. The Court of Session did it even in a case where the error (an erasure in an unessential part) was so small that there could be no doubt that the judgment they recalled (and pronounced of new) was a valid standing judgment.<sup>(z)</sup> Had the Sheriff Court possessed any such power, the statutory provisions would have been unnecessary.<sup>(a)</sup>

#### Section XI.—OF EXPENSES.

- |   |   |
|---|---|
| 1. <i>Of the Right to Expenses.</i>                               | 8. <i>Objections to Taxation.</i>                         |
| 2. <i>Awarding Interim Expenses.</i>                              | 9. <i>Decree for Expenses in Agent's Name.</i>            |
| 3. <i>Awarding Final Expenses.</i>                                | 10. <i>Agent's Right to continue Action for Expenses.</i> |
| 4. <i>Scale of Expenses.</i>                                      | 11. <i>Agent's Liability for Expenses.</i>                |
| 5. <i>Modifying Expenses.</i>                                     | 12. <i>Expense of Taxation and Decree.</i>                |
| 6. <i>Taxation.</i>   |   |
| 7. <i>Accounts of, or against, several Pursuers or Defenders.</i> |   |

**1. Of the Right to Expenses.**—The matter of expenses is in the discretion of the Court, a discretion now exercised

(z) Cadell, 14th Jan. 1853. 15 D. 282.

(a) See *White v. M'Ewen's Trs.*, 13th May, 1878, 11 M. 602, as to the

common law powers of correcting errors. Whatever they may be they are evidently less extensive than the statutory.



according to well fixed principles. Formerly, expenses were a penalty of rash litigation. The loser was not liable in them if he had litigated in good faith, and had done no more than was requisite to protect what he reasonably believed to be his rights. The rule now is, that a loser, with whatever good faith or on whatever good grounds he may have acted, is liable in expenses, because by his litigation the successful party has been put to expense in vindicating or defending his right; and this rule is followed with great rigidity unless some strong special reason is made out for departing from it.(a) It is questionable whether this principle is not carried out too strictly, and whether rules, such as those prevailing in the English Courts, which would deal less severely with the defeated party, might not be more equitable. But there is no questioning the fact that the matter of expenses is governed in Scotland almost exclusively by the decision on the merits. So much is this the case, that if the consideration of the merits of the case be withdrawn from the Court by a compromise, the Court will refuse to pronounce any decision in regard to the expenses.(b)

There are some apparent exceptions to the general rule in regard to expenses, which are little else than the application of the rule to details. If a pursuer, though successful, has asked originally an exorbitant amount, he will not be allowed full expenses.(c) This, however, does not apply to actions of

(a) *Kirkpatrick v. Irvine*, 18th Jan. 1848, 10 D. 367. Reversed on merits, but not criticised on the point in question in the House of Lords, 2nd Aug. 1850; 7 Bell's Appeal Cases, 186; *Torbet v. Borthwick*, 23rd Feb. 1849, 11 D. 694.

(b) *Dobie v. M'Farlane*, 17th June, 1856, 18 D. 1043. If it is intended

that a settlement or compromise of the merits of a case is not to settle expenses also, there must be a special reservation of them in the agreement or discharge.

(c) *Smith v. West of Scotland Exchange Investment Co.*, 4th Dec. 1847, 10 D. 213.

damages in which a random sum is concluded for. There, the pursuer gets expenses even though he have got a very much smaller sum than he asked for.(d) In actions of damages for defamation the pursuer generally gets his expenses, even though he may have got such purely nominal damages as a farthing.(e)

In certain cases a successful pursuer may be subjected in expenses. This happens when he gets less than was tendered to him before the action was raised,(f) or while it was proceeding.(g) A tender cannot be taken into account unless it include the expenses incurred. It should do so expressly, but it may also do so by implication, by offering a sum large enough to cover both them and the sum due.(h) In actions of damages for defamation, a tender to be available must be accompanied by a full retraction.(i) As regards the interest of defenders, it is a general rule that a tender is of no avail where the pursuer gets more than is tendered.(j) The proper and usual form of tender after an action has begun, is to embody it in one of the pleadings, or in a separate minute, but it is also competent to found upon a tender made by letter.(k)

(d) *Galloway v. Mackenzie*, 4th Dec. 1860, 33 Jurist, 48. The pursuer asked £500 and got £15 damages for the death of her husband, occasioned through defender's fault.

(e) *Rae v. M'Kay*, 20th Nov. 1852, 15 D. 30. The common law rule has been altered by statute in the Court of Session. See 31 & 32 Vict. c. 100, § 40.

(f) *Ramsay v. Souter*, 19th March, 1864, 2 Macph. 891. A tender is in time to save expenses if it be made before the summons is served; *Mintons v. Hawley*, 16th Nov. 1882, 20 S. L. R. 126. The case, however, was special.

(g) *Imrie v. M'Whannel*, 21st Jan.

1847, 9 D. 522. In this case the pursuer gets expenses to the date of the tender, and the defender subsequently.

(h) *Aitchison v. Steven*, 24th Nov. 1864, 3 Macph. 81.

(i) *Faulks v. Park*, 22nd Dec. 1854, 17 D. 247.

(j) *Per Lord J.-C. Inglis, Webster v. Alexander*, 12th July, 1859, 21 D. 1214.

(k) *Little v. Burns*, 16th Nov. 1881, 9 R. 138. Here the tender, which was by a pursuer to take less than he was suing for was disregarded, because he ultimately got less than he offered to take, and because the tender stipu-

The right to expenses may be subjected to modification where a party, successful on the whole, has not been successful in making out, or getting free from, particular claims. Here the strictly accurate (and generally inconvenient) course is to find each party entitled to his expenses in so far as he has been successful;<sup>(l)</sup> but by modifying the expenses allowed to the more successful party, an equally equitable result may be attained with sufficient exactness. And the expenses may also be modified where the successful party has incurred by excessive litigation more expense than was necessary in vindicating or defending his right, either by heaping up unnecessary proceedings *ob majorem cautelam*, or by omitting to plead the legal ground on which he succeeded until expense had been incurred in discussing other grounds.<sup>(m)</sup>

**2. Awarding Interim Expenses.** — Interim awards of expenses are made when it is thought desirable to dispose of the expense attending any particular step at the time when it has been occasioned. Thus, expense occasioned to the defender by the pursuer having found it necessary to amend his petition;<sup>(n)</sup> or by either party having lodged pleadings or taken steps not authorised by the regulations as to the forms of process;<sup>(o)</sup> or by one party being present at a meeting ordered by the Sheriff, and the other being absent or not prepared to proceed,<sup>(p)</sup> may be at once decerned for. In the Supreme Court it is the practice to award the expense of discussing dilatory defences at once against the party who has failed. Although at common law there can be no doubt

lated for expenses to which a settlement on the footing of paying its amount at its date, would not have entitled him.

(l) See *Stoppel v. Maclaren*, 18th Dec. 1850, 13 D. 345.

(m) *Adam v. Watson*, 19th June, 1829, 7 S. 775.

(n) A. S., 10th July, 1839, § 41.

(o) *Ibid.* §§ 42 and 65.

(p) A. S., 4th Dec. 1878, § 19.

but that the Sheriff possesses the same power, the Regulations of the Sheriff Court do not direct the Sheriff to dispose of the matter of expenses except in the case of his sustaining the dilatory defences or any of them, and are indeed so worded as to imply that, in the case of his repelling the dilatory defences, he is not to deal with the expenses.(q)

When interim expenses are awarded there is a small point of form which requires a moment's notice. If the interlocutor expressly "modify" a specified sum as the expenses in question, there is an end to that matter; and though the party who has got these expenses be ultimately successful he will not be allowed to claim more than he then got, even on showing that the sum modified was really insufficient to cover the expense which was incurred. On the other hand, if a sum be awarded without the use of the word "modify," it is regarded as a sum awarded to account, and on the party who gets it being ultimately successful, he will then get any additional expense which the sum awarded may have been insufficient to cover.(r)

An interim award of expenses is generally allowed to be extracted at once. In extreme cases the Court may make it a condition of the party being allowed to proceed with his action that he shall first pay them.(s) In general, however, this condition is not imposed (except in the case of reponings), and the successful party recovers the expenses by the ordinary diligence of the law.

No repetition of interim expenses is claimable at the end of the action. The party who gets them keeps them, and cannot be required to repay them on being ultimately

(q) A. S., 1839, § 40.

Feb. 1861, 33 Jur. 221, and 23 D. 534.

(r) Cameron v. Muir, 13th Feb. 1861,  
33 Jur. 272, and 23 D. 535; Strangford  
v. Hurlet & Campsie Alum Co., 5th

(s) Wallace v. Henderson, 22nd Dec.  
1876, 4 R. 264.

unsuccessful. Still less can he then be subjected in any part of the other party's expenses connected with the proceeding in question.(t)

**3. Awarding Final Expenses.**—Final expenses are awarded in the interlocutor disposing of the merits of the cause.(u) It used to be held that they might be awarded though not concluded for, but this cannot now be relied on.(v) When awarded, they should always be awarded expressly, for it is held in contested causes that a decree in terms of the conclusions of the libel does not include expenses, even when the libel concludes for them.(w) In decrees in absence expenses follow, when concluded for, as a matter of course. If the interlocutor disposing of the merits be silent as to expenses, and nothing be done to supply the deficiency before the case is brought to an end by extract, it will be held that the Court intended to make no award of expenses; and neither party will be allowed to re-open the question in any future proceeding.(x) If the party who has been awarded expenses extracts the principal decree before having the expenses taxed and decerned for, he is held to pass from his right, for by extracting the decree he has taken his whole case out of Court.(y)

**4. Scale of Expenses.**—If the amount sued for be such as could have been sued for in the Small-Debt Court, the pursuer will not be allowed higher expenses than those

(t) A. S., 10th July, 1839, § 108, and also § 107.

(u) *Ante*, sect. 10, art. 5, p. 191.

(v) *Ante*, sect. 1, art. 4, p. 108.

(w) *Young v. Sinclair*, 21st May, 1796, M. 10,053; and *Western Bank v. Buchanan*, 28th Nov. 1865, 4 Macph. 97.

(x) *Ante*, sect. 10, art. 6, p. 192; *M'Dowall v. Stewart*, 1st Dec. 1871, 10 M. 193.

(y) *Rothsay v. Macniel*, 17th Nov. 1789, M. 12,188. To avoid this result, leave is sometimes given to extract the principal decree *ad interim*.

provided for in it, unless the Sheriff shall be of opinion that the action was one fit to be brought in the Ordinary Court.<sup>(z)</sup> If the action is of the kind suited to the Ordinary Court, the award of expenses is either a general award of expenses as they may be taxed, or an award containing a direction to tax according to one of the two scales which are in use. The first scale is applicable to causes where the amount of principal and past interest concluded for, or, in an action of damages awarded, does not exceed £25, and the second, where this amount exceeds that sum. In all cases, the Sheriff may, if he think fit, direct the amount to be taxed according to the scale applicable to the amount decerned for; and though the amount concluded for be under £25, he may direct taxation according to the higher scale, if he thinks the amount does not indicate the nature or importance of the case.<sup>(a)</sup> Such directions ought, properly speaking, to be given in the interlocutor awarding the expenses, but there seems nothing to make it incompetent to give the direction at any time before the actual taxation.

**5. Modifying Expenses.**—The circumstances in which expenses should be modified having already been explained in treating of the right to expenses (art. 1), and the special meaning attached to the word in the case of interim expenses having been noticed (art. 2), there is not much further to be said. The finding that expenses are to be modified must be contained in the interlocutor awarding them. The actual modification usually takes place after the taxation. It may, however, be contained in the original interlocutor, either in

(z) A. S., 4th Dec. 1878, § 2. When a case in the Small-Debt roll has been remitted from the ordinary roll, expenses on the ordinary scale may be allowed; *Ibid.*  
 (a) A. S., 4th Dec. 1878, §§ 1 and 2.

the form of saying that the expenses shall be modified to a certain proportion of the taxed expenses, or by dispensing with the taxation, and fixing at once a sum as the expenses due. This latter course is seldom followed, except of consent of both parties, when the amount is small and they are anxious to have an end of it.

**6. Taxation.**—The account must be taxed before extract,(b) and that is done by the Auditor of Court in presence of the parties or their agents. The party entitled to the expenses lodges a copy of his account in process, and serves another upon the opposite party, with an intimation of the diet fixed by the auditor for taxation. It does not appear what amount of notice is requisite for this meeting, but it must be reasonable. The rules for the auditor's guidance will be found in the Acts of Sederunt(c) regulating this matter, and the more important only can be noticed here.

The auditor allows such expenses only as are absolutely necessary for conducting the litigation in a proper manner with a due regard to economy.(d) He disallows, without express instruction, the expense of all parts of the proceedings in which the party has been unsuccessful, or which have been occasioned by his own fault.(e) For example, if the pursuer have had to restrict the conclusions of his petition before getting decree, the expense of doing that will not be held to fall within the general expenses to which he may have been found entitled.(f) The auditor's duty, in respect of disallowances under this rule, is the same whether expenses have been modified or not, the fact that the Court intends to modify, or has modified, the

(b) A. S., 10th July, 1839, § 105.

(e) A. S., 10th July, 1839, § 107;

(c) A. S., 10th July, 1839, §§ 105-9;  
and 4th Dec. 1878.

A. S., 4th Dec. 1878, § 9.

(d) A. S., 4th Dec. 1878, § 8.

(f) *Fimister v. Milne*, 24th May,  
1860, 22 D. 1100.

expenses, in no way concerning him.(g) The Court, may, however, depart from the rule if it see cause; and parties have been found entitled to the expenses of questions on which they have been unsuccessful, where it has been considered that they should not have been raised by the opposite party.(h)

Outlay is not admitted unless it be duly vouched and sufficient receipts be produced to the auditor. Certain kinds of outlay are specially alluded to in the Acts of Sederunt, but there is no ground for supposing that it was intended that those kinds should be all that should be allowed. On the contrary, it would appear that there is nothing to prevent all just and necessary outlay to which a successful party has been put in conducting his cause from being charged. The rule saying that no other or higher *fees* than those contained in the table are to be allowed, does not apply to *outlay*; and very properly so, because it is impossible to foresee what outlay may be required. The outlay charged must be real, and, therefore, discounts allowed to the agent by persons whom he has employed must be credited to the client.(i) Where professional witnesses must examine work, or make preparations before coming to the court, the expense incurred for this is allowed, provided the Sheriff sanctions it within the prescribed time; that is, within eight days of the trial if the Court is in session, and within eight days after the beginning of the next session if in vacation.(j)

(g) *M'Elroy v. Tharais Co.*, 28th June, 1879, 6 R. 1119.

(h) *Cullen v. Smeal*, 8th March, 1855, 17 D. 636, where it was held that a defender who knew that the pursuer had written evidence of the debt ought not to have pleaded pre-

scription. In regard to the particular application here made, see *Lamond's Trs. v. Merry*, 19th June, 1863, 1 Macph. 940.

(i) *Ronaldson v. Drummond & Reid*, 15th July, 1881, 8 R. 956.

(j) A. S., 4th Dec. 1878, sch. § 11.



The fees payable to the Sheriff-Clerk as the fees of court form part of the recoverable outlay. Those fees are fixed by the Sheriff-Court Act of 1838,<sup>(k)</sup> for all Sheriff-Clerks appointed subsequent to its date, and for all other Sheriff-Clerks are fixed by special tables. Fees to counsel are not allowed unless their employment be either authorised or subsequently sanctioned.<sup>(l)</sup> Though both parties should employ counsel, the authority or approval is necessary, and care must be taken to procure it before an appeal from the Sheriff Court.<sup>(m)</sup> No other or higher fees are allowed than those set forth in the table. This rule is strictly enforced. As already pointed out, it does not apply to outlay as distinguished from professional charges.

The last rule which it is of consequence to notice specially is, that the auditor not only cuts off irregular or overstated charges, but adds omitted charges, and increases understated charges to their proper amount. This rule is founded on equity. By applying it, the audit may have the effect of increasing the account to an amount larger than that at which it was rendered.<sup>(n)</sup>

#### 7. Accounts where several Pursuers or Defenders.—

Where there are several pursuers, as they must have a joint interest, so they must unite in employing one agent. If they do not, that is their own affair, and the expense of employing more than one agent is not allowed against the defender.

(k) 1 & 2 Vict. c. 119, § 28, and schedule.

(l) A. S., 4th Dec. 1878, Sch. § 4.

(m) Mackenzie v. Blakeney, 16th Oct. 1879, 7 R. 51; Hunt v. Rutherford, 20th Jan. 1855, 17 D. 305; Tay-

lor v. Drummond, 9th Dec. 1848, 11 D. 223; Purvis v. Dowie, 13th May, 1869, 7 M. 764.

(n) Reeve v. Dykes, 21st May, 1829, 7 S. 632.

Where there are several defenders having the same interest, they cannot recover the expense of employing more than one agent. If they cannot agree upon one, that is their misfortune; and though they should be successful, they will only recover from the pursuer the expense of a consultation at the commencement of the action, and of a joint defence thereafter.<sup>(o)</sup> Even though the defenders should have pleas which might ultimately conflict, they must join and go together as long as they can.<sup>(p)</sup> On the other hand, when such defenders are unsuccessful, the pursuer will be entitled to payment from them of the additional expense which their employment of separate agents has occasioned to him. Where several defenders have separate or conflicting interests, they may employ separate agents, and each will recover his expenses from the pursuer. If, however, they do employ one agent, that agent will not be allowed, on gaining the case, to charge more than once for what was for the common good of the defenders, together with the additional cost occasioned by the defenders being more than one in number.<sup>(q)</sup>

**8. Objections to Taxation.**—On concluding the taxation, the auditor makes a report (at the end of the account), stating the sum at which he has taxed the account, as well as any special matters which he thinks it necessary to bring before the Court. Within forty-eight hours after the taxation, it is competent for either party to lodge objections to it. These objections must be stated specifically. The Act of Sederunt

(o) *Edinburgh and Glasgow Railway Co. v. Arthur*, 24th Feb. 1858, 20 D. 677. In *Stott v. Fender*, 17th Oct. 1878, 16 S. L. R. 5, the pursuer was found liable in an amount equal to the full expenses of the one defender, and a

"watching fee" for the other.

(p) *Canada Copper Co.'s Liquidator v. Peddie*, 22nd Dec. 1877, 5 R. 393.

(q) *Greenhill v. Gladstone*, 7th June, 1861, 23 D. 1006.

of 1839 (§ 109) directs the Sheriff to dispose of them, either with or without answers; and as there is a subsequent regulation which prevents the ordering of answers,<sup>(r)</sup> they are now disposed of after hearing parties in the motion-roll.

**9. Decree for Expenses;—in Agent's Name.**—If no objections are lodged to the auditor's report, decree for expenses passes as a matter of course, on the party entitled to them enrolling the case for that purpose. It is competent for the Sheriff (if he see cause), on the application of the agent who conducted the suit, to allow the decree for expenses to go out and be extracted in name of such agent.<sup>(s)</sup> It is held in some courts that the application can be granted only if made at the time of moving for the decree for expenses; but this seems very unnecessarily strict. In other courts it is held that the application may be granted at any time before extract.<sup>(t)</sup> When competently granted, the effect is to make the expenses payable to the agent, and not to the party. It is frequently done with the view of avoiding claims of compensation which the losing can make against the successful party, but cannot make against his agent.<sup>(u)</sup> An agent taking decree in his own name, and getting payment, has to remember that if the decree be recalled at a subsequent stage of the litigation, he will be personally liable in repayment.<sup>(v)</sup>

**10. Agent's Right to continue Action for Expenses.**—After an interlocutor has been pronounced, either expressly or

(r) 16 & 17 Vict. c. 80, § 12.

(s) A.S., 10th July, 1839, § 106. This provision is not available to the agent of a party who has died, unless his representatives have been sisted before the motion is made; Baillie, 25th Jan. 1872, 10 M. 414.

(t) Compare *M'Tavish v. Pedie*, 13th June, 1826, 4 S. 704.

(u) *Miller v. Geils*, 22nd June, 1848, 10 D. 1384.

(v) *Cormack v. Tod*, 3rd June, 1845, 7 D. 812.

virtually deciding the question of expenses, the parties cannot enter into a compromise in such a way as to deprive the successful agent of his right to recover expenses.(w) If they make any such compromise the agent is nevertheless entitled to sist himself as a party, and to take up the cause and carry it on to the effect of getting decree for his expenses. In doing this he takes the risk of the interlocutor finding expenses (if it is not final) being reversed.(x) Where no interlocutor either virtually or expressly finding expenses due has been pronounced, there will be great difficulty in allowing the case to be carried on. To entitle an agent to do so he must aver bad faith and collusion between his client and the opposite party, if not also that his own client is unable to pay, and even then the Court will perhaps not permit him.(y)

**11. Agent's Liability for Expenses.**—An agent may render himself personally liable in expenses either by conducting a case without authority or by occasioning expense by his own fault or negligence. Agents therefore require to be careful as to the authority under which they conduct cases.(z) They must be specially careful how they deal with lunatics, and others incapable of giving legal consent. An agent was found liable in expenses when he had opposed, at the request of a person alleged to be imbecile, measures taken to have his property put under guardianship.(a) Cases in which an agent

(w) *M'Lean v. Auchinvole*, 29th June, 1824, 3 S. 190, and cases there cited; *Macgregor v. Martin*, 12th March, 1867, 5 M. 583.

(x) *Hamilton v. Dixon*, 9th July, 1824, 3 S. 242.

(y) *Murray v. Kyd*, 14th Feb. 1852, 14 D. 501; *Smith v. Smith*, 21st Feb. 1871, 9 Macph. 538. See also *Mackay's Practice*, vol. i., p. 142.

(z) *Philip v. Gordon*, 5th Dec. 1848, 11 D. 175. An agent for a private pursuer, who (without authority) used the Lord Advocate's name as concurring was held personally liable in expenses to the defender; *Robertson v. Ross*, 16th July, 1873, 11 Macph. 910.

(a) *M'Call v. Sharp*, 31st Jan. 1862, 24 D. 393.

has been found personally liable on the ground of carelessness are of course all special. One case may be mentioned, that of an agent who made a mistake in intimating the hour of an examination, in consequence of which certain parties were not present and a decree was pronounced in their absence.(b)

**12. Expense of Taxation and Decree.**—As a general rule, the party liable for the account pays the expense of taxation. If the amount struck off be excessive, the expense of taxing may however be laid on the party entitled to the account. There is no rule as to fixing the amount which must be struck off before this is done, but the understood practice in the Court of Session is, that the losing party pays the expense of taxing unless a fifth or thereby of the amount of the account is struck off.(c) If more is struck off the Court appears to have discretion, according to circumstances, to order the cost of taxing to be divided, or to be entirely borne by the gaining party. In England the rule is, that the gaining party pays the cost of taxing if more than a sixth of the bill be taxed off.(d)

The cost of obtaining the approval of the auditor's report and the decree for expenses is also paid by the losing party. Where he desires to avoid this, he must previously tender the amount of the expenses incurred.(e) This tender must include the expense of extracting the principal decree, as the successful party is entitled to have an extract, even though his expenses be paid.(f)

(b) *M'Kechnie v. Halliday*, 23rd Feb. 1856, 18 D. 659.

(c) See *Cameron v. Chapman*, 18th Nov. 1835, 14 S. 24; and *Hogg v. Balfour*, 11th Feb. 1835, 13 S. 451.

(d) *Paterson's Compendium of*

*English and Scotch Law*, 2nd ed., sec. 1222.

(e) *Allan v. Allan's Trustees*, 1st July, 1851, 18 D. 1270.

(f) *Scott v. North British Railway*, 28th Feb. 1860, 22 D. 922.

CHAPTER III.  
ORDINARY ACTION—OCCASIONAL  
PROCEEDINGS.

SECTIONS.

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|--|---|
| I. OF THE POOR'S ROLL.   | V. OF ABANDONING, CONJOINING,<br>AND SISTING ACTIONS. |
| II. OF OBTAINING SECURITY FOR<br>THE SUM SUED FOR, OR FOR<br>EXPENSES. | VI. OF OCCASIONAL PROCEEDINGS<br>IN THE WAY OF PROOF. |
| III. OF SISTING OR CALLING NEW<br>PARTIES.                             | VII. OF THE REMEDIES AGAINST<br>DELAY.                |
| IV. OF AMENDING OR ADDING TO<br>THE PLEADINGS.                         | VIII. OF INTERIM DECREES.                             |
|  | IX. OF JUDICIAL REFERENCES.                           |
|  | X. OF THE REFERENCE TO OATH.                          |

HITHERTO we have supposed the steps of the process to follow each other in the order of time, and in their usual or normal course. There are, in addition to those steps, a number of other proceedings which may be taken at any time that the necessity for them arises. These we propose now to consider, grouping them (as satisfactorily as their varied description may permit) according to the nature of the result sought to be obtained.

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## Section I.—OF THE POOR'S ROLL.

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| 1. <i>Acts Regulating the Poor's Roll.</i>        | 6. <i>Petition for Admission.</i>              |
| 2. <i>The Poor's Agents.</i>                      | 7. <i>Remit to Poor's Agents, and Inquiry.</i> |
| 3. <i>Who Entitled to Benefit of Poor's Roll.</i> | 8. <i>Report by Poor's Agents.</i>             |
| 4. <i>Mode of Admission to Poor's Roll.</i>       | 9. <i>Effect of Admission.</i>                 |
| 5. <i>Certificate of Poverty.</i>                 | 10. <i>Striking Party off Poor's Roll.</i>     |

**1. Acts regulating the Poor's Roll.**—An ancient Act of Parliament provides for the appointment of advisers to act gratuitously on behalf of persons who are too poor to be able to conduct cases at their own costs.<sup>(a)</sup> This Act is in force; and the detailed regulations necessary for the carrying it into effect, in as far as regards the Sheriff Courts, are now contained in the Act of Sederunt of 1839, and in one passed in 1877.<sup>(b)</sup> In the Court of Session the matter is almost exclusively regulated by an Act of Sederunt passed in 1842,<sup>(c)</sup> and as most of the cases in the books have been decided with reference to its provisions, it is necessary to keep in view that they are more complicated than the Sheriff Court regulations.<sup>(d)</sup>

**2. The Poor's Agents.**—The Act of Sederunt of 1877 regulates the appointment of the procurators for the poor. The Sheriff annually summons a meeting of the procurators of each district in his sheriffdom where a local court is held, and calls on them to nominate such number of poor's agents as he

(a) 1424, c. 45.

(b) A. S., 10th July, 1839, §§ 135, 136; and A. S., 16th Jan. 1877.

(c) A. S., 21st Dec. 1842. See also A. S. S., 10th August, 1784, 11th July,

1800; 16th June, 1819.

(d) A comprehensive treatise on the poor's roll of the Court of Session will be found in Mackay's Practice, vol. i. p. 335.

thinks right. The agents present elect by a majority, and their appointment has to be confirmed by the Sheriff; but it is not intended that he should make any such arbitrary exercise of his power as would place the appointment to any extent in his hands. He must confirm, or have good reason for declining to confirm.(e) If the procurators fail to meet, or to make appointments satisfactory to the Sheriff, he may himself appoint. A poor's agent holds his office for a year,(f) and after its lapse continues to act to the final issue of such causes as may have been assigned to him in the course of it. He also attends to the taking of evidence on commission within his district, and he precognosces witnesses resident within it, when these things are requisite in actions on the poor's roll of courts of other districts. It is a matter of regulation (A. S., 1839, § 135) that only an appointed poor's agent shall act on behalf of a litigant who sues on or is sued *in forma pauperis*. The poor's agents are not expected to give their clients more than the benefit of their professional services. A poor's agent is therefore free from the ordinary liability of a procurator to pay the expenses of witnesses whom he has caused to be cited, or the charges or allowances of Sheriff-Clerks, Short-hand writers, Sheriff-officers, or Bar-officers.(g)

**3. Who entitled to Benefit of Poor's Roll.**—The persons entitled to the benefit of the services of the poor's agent are described in the regulations as persons who are "not pos-

(e) *Colquhoun v. Paterson*, 8th March, 1850, 12 D. 851. In this case it was held a good reason for disapproving that the person appointed poor's agent resided twenty miles from the Court. The opinions were given with reference to a

former Act of Sederunt, but its language was not materially different on this point.

(f) A. S., 16th Jan. 1877.

(g) A. S., 4th Dec. 1878, § 13.



seemed of funds for paying the expense" of suing or defending the action.<sup>(h)</sup> This description is pretty wide, and it is perhaps difficult to make it more specific. The question whether an individual falls within it depends partly on his circumstances and partly on the nature of the action in prospect. It is an error to suppose that the poor's roll is intended for all persons in the lower ranks of life. It is meant only for those who, in consequence of poverty, are not able to meet the expense of litigation. It is not enough that it be inconvenient for a person to meet such expenses. The person must be in such circumstances that it would amount to something like a denial of justice if he were not allowed to have the benefit of the poor's roll.<sup>(i)</sup>

**4. Mode of Admission to Poor's Roll.**—A person desirous of obtaining the benefit of the poor's roll gets a certificate, in the way mentioned in the following article, that he is not possessed of funds for paying the expense of the action. He then applies by a petition, which the Sheriff remits to the procurators for the poor, who hear parties, and report whether in their opinion the petitioner has a "*probabilis causa litigandi*." On considering this report the Sheriff disposes summarily of the petition.<sup>(j)</sup>

**5. Certificate of Poverty.**—The certificate of poverty may be granted either by the minister of the applicant's parish, by the heritor on whose lands he resides, or by two elders. The minister may be that either of the civil or of the *quoad sacra*

(h) A. S., 10th July, 1839, § 135.

(i) See *Walker v. Brown*, 3rd Feb. 1860, 22 D. 678, the cases there cited, and the Digest of Cases, *voce* Poor's

Roll. See also *Robertson*, 8th July, 1880, 7 R. 1092, where an exception was made on special grounds.

(j) A. S., 10th July, 1839, § 135.

parish ;(*k*) and the minister of the latter is to be preferred, as being more likely to know the circumstances. The certificate cannot be granted by a dissenting minister.(*l*) It is to be inferred, though it is not said, that the elders are to be of the parish where the applicant resides. It is enough if they be acting elders, without inquiring too minutely whether they have been ordained.(*m*)

The terms of the certificate of poverty should be, that it consists with the personal knowledge of those who grant it that the person who means to bring or defend the action, as the case may be, is not possessed of funds for paying the expense. The person applied to is not at liberty to refuse a certificate because he is unable to give one in the required terms : in that case he must give one setting forth what are the circumstances of the applicant to the best of his knowledge and belief.(*n*) The person applied to has no right to take into consideration the merits of the proposed action or defence, or to consider whether the applicant ought or ought not to proceed with the case. If he altogether refuse a certificate, he may be cited before the Sheriff to give evidence as to the applicant's circumstances ;(*o*) and in extreme cases he may even be subjected in the expenses which his non-fulfilment of the duties imposed by the Act of Sederunt have occasioned.(*p*)

When the case occurs of none of the specified persons being in a position to issue a certificate, equivalents may be admitted. The Court of Session has held the fact of the party being in

(*k*) *Murrie v. McDonald*, 24th Dec. 1853, 16 D. 325.

(*l*) *Elphinstone*, 11th Feb. 1836, 14 S. 463. See also *Carrigan*, 17th Nov. 1881, 9 R. 149.

(*m*) *MacIntyre*, 17th Feb. 1830, 8 S. 549 ; *A. B. v. O. D.*, 26th Nov. 1833, 12 S. 127.

(*n*) See cases quoted in next note, and *Dickson*, 15th Jan. 1852, 14 D. 330.

(*o*) *Glass*, 7th March, 1833, 11 S. 543 ; *Smith*, 8th July, 1834, 12 S. 890.

(*p*) *Morris v. Greig*, 10th July, 1835, 13 S. 1092.

receipt of permanent poor relief to be sufficient evidence of poverty.(q) In other cases they have remitted to the Sheriff(r) or to a Justice of Peace resident in the parish(s) to inquire.

**6. Petition for Admission.**—The petition for admission sets forth what is the nature of the action to be sued or defended,(t) and craves admission to the poor's roll. Where the applicant is a pupil, or under guardianship, the application must be made with consent of the tutor or curator, if there be any. If there be none, the Court will first of all appoint a tutor(u) or curator(v) *ad litem*, as the case may be, and will then deal with the petition.

If the certificate accompanying the petition be in the requisite terms, the Sheriff will remit to the procurators for the poor. If the certificate be special, the Sheriff will determine whether the circumstances entitle the applicant to admission; and he may (if necessary) order further inquiry. If the petition be presented without a certificate, and the reasons for its absence are sufficient, the Sheriff will take some such means as those taken in the Court of Session for ascertaining the applicant's circumstances.

**7. Remit to Poor's Agents, and Inquiry.**—The procurators for the poor appoint intimation of the petition to be

(q) Muir, 6th Feb. 1849, 11 D. 517. The party must, however, get himself formally placed on the poor's roll, if he desires its benefits; *Hunter v. Clark*, 10th July, 1874, 1 R. 1154.

(r) Thomson, 21st Jan. 1829, 7 S. 301; A B, 20th Jan. 1831, 9 S. 308; A B, 30th June, 1836, 14 S. 1040.

(s) Stewart, 8th Dec. 1853, 16 D. 164. In Flynn, 8th June, 1882, 9 R. 909, the applicant was resident in Ire-

land, and in weak health. The Court of Session allowed him to make the requisite declaration of poverty before a magistrate in Ireland, who was willing to give the required certificate.

(t) Duncan, 28th Jan. 1846, 8 D. 411.

(u) Davidson, 23rd Dec. 1865, 4 M. 276. Applicant was a pupil.

(v) Rennie, 28th June, 1851, 13 D. 1257. Applicant was a married woman.

made to the opposite party.(w) This is given either in the hitherto ordinary way, by an officer of Court, or under the Act regulating Postal Citations.(x) After hearing parties, or inquiring into the case, the poor's agents report their opinion whether the petitioner has a *probabilis causa litigandi*. This is the only matter which the Act of Sederunt directs them to take up; but if the respondent deny the poverty, it does not appear incompetent for them at the same time to inquire into and report on the grounds on which that is done. A different course is taken in the Court of Session, where the objection that the applicant is not poor enough to have the benefit of the roll has to be stated before the remit on the *probabilis causa* is made; but in the Court of Session the respondent has notice of the proceeding at earlier stages.(y)

8. Report.—On considering the report of the procurators for the poor, the Sheriff either grants or refuses the benefit of the poor's roll.(z) The Sheriff has no power to review the decision of the procurators when they report either affirmatively or negatively on the *probabilis causa*.(a) If, however, they differ in opinion, it will be for the Sheriff to decide; and as the Court of Session, in such a case, admits, he will probably follow their example if no strong reason appear to the contrary.(b) After the petitioner is admitted, the objec-

(w) A. S., 10th July, 1839, § 135.

(x) 45 & 46 Vict. c. 77, § 3.

(y) Allan v. Allan, 28th Feb. 1872, 10 Macph. 510; Douglas v. M'Veigh, 18th March, 1881, 8 R. 667. The question of poverty is sometimes specially remitted to the reporters, Key v. Mackintosh, 15th Jan. 1878, 5 R. 524.

(z) A. S., 10th July, 1839, § 135.

(a) A. B. v. C. D., 19th Nov. 1833, 12 S. 58; Irvine, 22nd Dec. 1842, 5 D. 372. Possibly, if there was a gross neglect of duty on the part of the reporters, or other gross miscarriage, the Sheriff might interfere; Robson, 12th May, 1876, 13 S. L. R. 421.

(b) Marshall v. North British Railway Co., 13th July, 1881, 8 R. 939.

tion that the petitioner is not sufficiently poor is not renewable during the further course of the litigation, unless there be some change of circumstances.

**9. Effect of Admission.**—A person admitted to the poor's roll is not liable in payment of any of the dues of the Court, or fees to the procurator or to the Sheriff-officer who have acted for him, except actual outlay, unless expenses shall be awarded and recovered in the process.(c) A change of circumstances may, however, render him liable in expenses to his agent and the officer. If the agent recover money in the course of the process, he may deduct his expenses from it. This he does in such a case, whether the pauper has or has not been found entitled to expenses from his opponent.(d) In general, when a pauper succeeds, the opposite party should be found liable in expenses, and it is expressly directed that this shall be done by the Act of 1424.(e) When a pauper lost, it was the practice at one time not to find him liable in expenses to the opposite party; but this practice has been given up, and a pauper is now found liable in expenses to an opponent in the same way as another party would be, and the opponent is allowed to recover them as he best can.(f) This holds good with respect to expenses found due by *interim* as

(c) A. S., 10th July, 1839, § 135. There is no regulation in the Sheriff Court requiring the word *poor* to be affixed to the pauper's name in the titles of pleadings, but it is advisable to do so, that the clerk may know how to deal with the matter of fees.

(d) *Taylor v. Barr*, 11th March, 1841, 3 D. 892.

(e) 1424, c. 45. When expenses generally are awarded to a pauper, the

expenses of putting him on the poor's roll should not be included. This rule is expressly laid down for the Supreme Court (A. S., 21st Dec. 1842, § 15), and the example should be followed in the Sheriff Court.

(f) The rule is the same in the Court of Session; *Mackay's Practice*, vol. ii. p. 605; *Gordon v. Davidson*, 18th June, 1865, 3 M. 938.

well as by final decrees. Thus a pauper is not reponed against a decree in absence or by default on more favourable terms than any other party.(g)

**10. Striking Party off Poor's Roll.**—The Sheriff may at any time, when he sees cause, deprive a party of the benefit of the poor's roll. This power he may exercise when an end has come either to the *probabilis causa* or to the poverty. Thus where a tender, *prima facie* sufficient, was made in an action of damages, the pauper who refused was struck off the roll.(h) In like manner a pauper would be struck off the roll on an accession of wealth removing him from the class for which it is intended. The power to remove is given in terms wide enough to meet any emergency, and would apply to such a case as that of a pauper who abused his privilege by carrying on a litigation in an unnecessarily vexatious manner.(i)

(g) *Ord v. Ord*, 12th Nov. 1861, 24 D. 25 (case in Court of Session), where the matter is regulated by Special Act of Sederunt. In the absence of express provisions, it is presumed that a Sheriff will hold the example of the Supreme

Court as conclusive in exercising the discretion allowed to him in dealing with expenses.

(h) *A. B v. Fraser*, 8th July, 1836, 14 S. 1114.

(i) *A. S.*, 10th July, 1839, § 135.

Section II.—OF OBTAINING SECURITY FOR THE SUM SUED FOR, OR FOR EXPENSES.

ARRESTMENT IN SECURITY.

1. *Warrant of Arrestment on the Dependence.*
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18. *When Mandatary Required.*
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EFFECT OF FAILURE.

25. *Effect of failing to Consign, or find Caution or sist Mandatary.*

The pursuer only is concerned with getting security that the defender will be liable to meet the debt if decree is given against him. There are two ways in which he may get this security, one, of perhaps too extensive applicability, arrestment on the dependence; and the other, of very limited applicability, getting consignation or caution for the sum sued for. These two proceedings will form the first subjects of the present section.

Both the pursuer and the defender may be concerned in

getting security for the expenses. It will be requisite, therefore, to consider when either may be called on to find caution for expenses. In connection with this subject may be taken the peculiar power which exists, of making a pursuer or defender who resides abroad find security for expenses by means of sisting a mandatary. It is true that this proceeding has in theory other objects, but practically it has no other legitimate aim, and it may, therefore, be also fittingly included in this section.

#### ARRESTMENT IN SECURITY.

**1. Warrant of Arrestment on the Dependence.**—Arrestment in security is a means by which a pursuer can prevent a defender from putting away funds or property which he has in the hands of third parties. The object of it is that the pursuer may be able to get payment of his debt in the event of his succeeding in the action. It can be used in connection with pecuniary conclusions only, and it may not be used to get security for expenses.<sup>(a)</sup> As the pursuer takes the step for his own security, he takes it at his own cost.<sup>(b)</sup> He is under no control as to using arrestment, beyond being liable in damages if he use it wrongly; but on the application of the defender an arrestment may be recalled by the Sheriff, or be loosed on caution being found, or be restricted in amount. The right to arrest in security is mainly regulated by the Personal Diligence Act (1 & 2 Vict. c. 114, §§ 19 to 22) and the Act of Sederunt of 10th July, 1839 (§§ 18, and 153 to 156). The right to arrest is explained here only in so far as is necessary to show how security is got; but it may be

<sup>(a)</sup> *Stafford v. M'Laurin*, 20th Nov. 1875, 3 R. 148.

<sup>(b)</sup> *Symington v. Symington*, 11th June, 1874, 1 R. 1006.



added, that when followed up without undue delay, arrestments in security confer a preferential right on the creditor in the same way as arrestments in payment.(c)

The warrant of arrestment may be contained either in the warrant of citation granted on the petition,(d) or in a separate writ.(e) The latter, called a precept of arrestment, may be issued by the Clerk at any time till the process has ceased to depend before the Sheriff,(f) on there being produced to him a petition with pecuniary conclusions. The precept must narrate the ground of application for the arrestment, and the Clerk is prohibited from issuing blank precepts on any pretext whatever.(g) When annexed to the petition, the warrant is simply to "arrest on the dependence." When contained in a precept, the form is much longer.

**2. Time for Arrestment.**—Service of the warrant of arrestment annexed to the petition upon the persons who are due money to, or hold property of, the defender, may be made either before or after the service on the defender of the petition itself. If the warrant be served before the petition, the latter must be served within twenty days thereafter, and must be enrolled within twenty days after the diet of comparance. When the expiry of this period falls within vacation, the petition must be enrolled on the first court-day thereafter.(h) After the

(c) *Mitchell v. Scott*, 29th June, 1881, 8 R. 875.

(d) 39 & 40 Vict. c. 70, Sch. A. It seems unnecessary to insert a formal prayer for this warrant in the petition, and that it is enough to ask the Sheriff-Clerk for it when he is issuing the authority to cite. See also 1 & 2 Vict. c. 114, § 19; 16 & 17 Vict. c. 80, § 1.

(e) *Sellar's Forms*, vol. i. p. 3.

(f) Compare *Latham v. Edinburgh and Glasgow Railway*, 18th July, 1866, 4 Macph. 1084.

(g) A. S., 10th July, 1839, § 153.

(h) A. S., 10th July, 1839, § 154. The Act of Sederunt says the summons must be "called," but as there is no such thing now as a formal calling, enrolment must be taken as its equivalent. If the first court-day after the expiry of

petition has been served, the warrant of arrestment remains available for service so long as the action depends.

Arrestment on a separate precept is generally used when a petition with no such warrant annexed has been served; but it may also be used before service, and in that case the petition must be served and called within the same time as when the warrant is annexed to the petition itself.

**3. Against whom, and how, Served.**—The warrant of arrestment is served on any of the defender's debtors, or on any one (not being the defender's servant, or other person holding solely as the defender's representative) who has property of the defender in his possession.<sup>(i)</sup> If the debtor reside out of the territory of the Sheriff, the Sheriff-Clerk of the sheriffdom where he resides is required to make and date an indorsement on the warrant.<sup>(j)</sup> It is served in the same manner as a petition in presence of one witness,<sup>(k)</sup> but if it be not served personally, a copy of the schedule of arrestment must also be sent by the officer by post to the last known place of abode of the arrestee, and the fact of this having been done must be mentioned in the execution, the address being also given in it.<sup>(l)</sup> It does not appear to have been contemplated that the new postal mode of citation should be used for arrestments.<sup>(m)</sup>

the twenty days from compareance be one of the vacation court-days, the summons must be enrolled on it, 16 & 17 Vict. c. 80, § 45.

(i) A creditor whose debtor had funds in the U. Bank's branch at L., arrested in the hands of "A. B. agent for the U. Bank at L." The arrestment was held invalid; *Graham v. Macfarlane*, 11th March, 1869, 7 M. 640. It would be different, however, if the agency were of such a character, that the

arrestor's debtor could sue him directly for the money; *Ritchie v. MacLachlan*, 27th May, 1870, 8 M. 815. See further as to this, *infra*, Ch. V.

(j) A. S., 10th July, 1839, § 155.

(k) 9 & 10 Vict. c. 67.

(l) 39 & 40 Vict. c. 70, § 12 (5). There is no requirement that the letter be registered.

(m) 45 & 46 Vict. c. 77, § 3. Without straining the meaning, a warrant of arrestment is neither a summons, war-

In general, the operation of the law of compensation makes it unnecessary to use arrestment of debts due by the pursuer himself to the defender. There is one case, however, in which a pursuer must, to protect himself, arrest goods in his own hand—viz., under the Mercantile Amendment Act,<sup>(n)</sup> when he has sold goods to the debtor and the price has not been paid, and he desires to be able to retain them as against subsequent purchasers from the original purchaser.

**4. What Arrestable.**—A pursuer in the ordinary court may in general arrest in security anything which he might arrest in payment; and when that subject is reached a short notice will be given of what are arrestable debts. The only difference between the two cases seems to be in the case of wages under twenty shillings a-week, which, for alimentary allowances, rates, and taxes, may be arrested in payment but which cannot be arrested in security for any debt whatever.<sup>(o)</sup>

**5. Return of Arrestment.**—The officer executing the warrant of arrestment must forthwith make a return of the execution to the clerk.<sup>(p)</sup> The object of this is, that the defender may be in a position to apply at once to have rectified anything which he may have to complain of in regard to its use.

**6. Taking off Arrestments.**—The defender may present a petition to have the arrestment loosed, or recalled, or restricted. The use of this remedy is peculiar to the defender or (so called) common debtor. If the arrestee disputes the validity of the arrestment, he must await and defend the action of furthcoming;<sup>(q)</sup> though probably if that course were

rant of citation, warrant of service, nor judicial intimation.

(n) 19 & 20 Vict. c. 60. The Act (§ 3) authorises either arrestment or pouding.

(o) 33 & 34 Vict. c. 63, Guthrie's

Select Cases, p. 371.

(p) A. S., 10th July, 1839, § 18.

(q) *Vincent v. Chalmers' Trustee*, 2nd Nov. 1877, 5 R. 43.

likely to cause him inconvenience he might try the question in a multiplepinding.

The application must be made in the Sheriff Court from which the warrant of arrestment has issued.<sup>(r)</sup>

Arrestments may be loosed either on general or on special caution. A general loosing takes place when caution is found to make the whole debt sued for (including principal, interest, and expenses) forthcoming on decree being pronounced against the defender. This is the kind which is commonly used, as it has the effect of relieving all the arrestments, however numerous they may be. A special loosing is, when the defender merely finds caution to make forthcoming at the proper time the amount of the particular debt or the value of the particular article that has been arrested.

Arrestments may be recalled where they have been used nimiously or oppressively, or without a sufficient warrant. As the power of arrestment in security is a very large power to give to a person alleging himself to be a creditor, and as the remedy given by loosing on caution may often be inconvenient, and even impracticable, courts exercise a liberal discretion in recalling arrestments, so as to prevent the power of using them from being abused.

Arrestments are restricted where the conclusions of the summons are for random sums, and where the pursuer has arrested more than it is at all likely that he can succeed in obtaining.

**7. Breach of Arrestment.**—A breach of arrestment occurs when the arrestee, notwithstanding it, makes payment to the defender of the arrested debt, or removes arrested articles. It is not necessarily a contempt of court.<sup>(s)</sup> The penalty on an

<sup>(r)</sup> 1 & 2 Vict. c. 114, § 21. The intervention of the Sheriff himself is not necessary for a general or special loosing on full caution. The matter may be

carried through before the Clerk. See Sellar's Forms, vol. i. p. 65.

<sup>(s)</sup> Inglis v. Smith, 26th Jan. 1867, 5 Macph. 320.

arrestee for breaking an arrestment is being liable in second payment of the arrested debt, and in payment of the damages he may have occasioned. This liability is made good in a separate action.(t) If the arrestee have in good faith made payment in excusable ignorance of the arrestment, he is not liable either in second payment or in damages.(u)

**8. Prescription of Arrestments.**—Arrestments in dependence prescribe within three years of the date of obtaining decree in the depending action; or, if the debt be a future one, within three years of its becoming due.(v) The pursuer, therefore, must, before this time expires, take the necessary steps for appropriating the arrested debts or goods in payment of his debt. These means will be considered when considering the execution which is competent on decrees.

#### ORDERING CONSIGNATION OR CAUTION.

**9. When competent to Order.**—In ordinary actions there is seldom much occasion to consider the competency of ordering consignment. There are two situations, however, where a pursuer is entitled to this security. If the pursuer sue for a debt which is admitted, or clearly shown to be due (such as rent), and the defender claim right to make deductions which are disputed and require to be established (such as damages for not having had the full use of what was let), the Court may, in its discretion, order such part of the admitted sum to be consigned as it may think fit.(w) Again, if the defender admit being due the debt, but challenge the right of the pursuer

(t) Erskine, tit. 6, 14.

(u) Laidlaw v. Smith, 26th Oct. 1841,  
2 Rob. Ap. Ca. 490.

(v) 1669, c. 9; 1 & 2 Vict. c. 114, § 22.

(w) Comming v. Williamson, 23th  
May, 1842, 4 D. 1304.

to sue for it, consignation may be ordered till that question is settled.(x) The ordering of consignation is in all cases, to a certain extent, matter of discretion ; but it must always appear (either by admission or in some other satisfactory manner) that there will be a balance due by the defender.(y) The Court will not order consignation if it be satisfied that the defender has been prevented by arrestment or other legal obstacle from complying with the order.(z)

Consignation or caution for the sum sued for, may be ordered where the pursuer founds upon a liquid document of debt, and the defender pleads some defence, which prior to the Act of 1877, would have required to have been established by an action of reduction in the Court of Session.(a) Where writings are null *ipso jure* or void,—for example, where they are executed without the requisite solemnities, or are contrary to the Stamp Acts, or the Bankruptcy Acts,(b) or to public morals, or to statutes declaring that no action can be maintained on them, or are granted by persons incapable, by force of law, of contracting—the provision does not apply. But it does apply where the writings are only null *ope exceptionis* or voidable—for example, where it is said that the writing is forged, or was extorted by force and fear, or was granted by a person who from his state at the time (as being drunk or insane) was incapable of contracting, or where it is said that it was obtained by fraud, or given under essential error.(c)

(x) Rolfe v. Drummond, 12th July, 1862, 1 Macph. 39.

(y) Findlay, Bannatyne & Co. v. Donaldson, 8th May, 1846, 5 Bell's Ap. Ca. 105. This case also shows that ordering consignment is not to be used to carry out an interim decree.

(z) Cowan v. Western Bank, 26th

June, 1860, 22 D. 1260.

(a) 40 & 41 Vict. c. 50, § 11.

(b) *Supra*, p. 68.

(c) For a full discussion of these points, see Mackay's Practice, vol. ii. pp. 120 to 155. It would occupy too much space to discuss them here in connection with an incidental question.

They do not seem to apply in the case of Bills of Exchange, since in their case a pursuer who desires to make a defender find security, should proceed at the proper time by way of the summary diligence which is competent on them, thus forcing the defender to suspend.(d)

**10. Effect of Consignation.**—The effect of consignation is to make the money subject to the orders of the Court, and to them only. There is no arrestment or other diligence which can prevent the orders of the Court as to the disposal of the consigned money from being carried out. The interest of any particular litigant, however, in the consigned money may be arrested by his creditors in the hands of the clerk, just as his interest in any other fund may be arrested.(e) But in such cases special circumstances may bar a particular individual from using arrestment.(f)

**11. Custody and Register of Consigned Money.**—By Act of Sederunt of 27th January, 1830—"The Lords [of Session] prohibit the Sheriff-Clerks from retaining in their hands any consignation of money above £10; and declare that they shall be obliged to lodge the same in a bank, at the direction of the Sheriff, within eight days, and shall be responsible for the custody of the banker's note, and be bound to account for interest of the sum deposited in a bank to the person to whom it shall be found to belong; and that all persons interested may have an opportunity of obtaining complete information as to the monies thus consigned with the clerks, and of claiming

(d) 45 & 46 Vict. c. 61. (Bills of Exchange Act, 1882), § 100.

(e) Pollock v. Scott, 9th July, 1844, 6 D. 1297.

(f) Campbell v. Lothians, 2nd Dec.

1858, 21 D. 63. The arrester in this case had asked the consignation, and it had been made under an arrangement which he himself had afterwards broken.

such monies, the said Lords direct the clerks to keep a record of such monies consigned with them, according to the form [prescribed], and that this record shall be patent to all parties interested, or their procurators, without paying any fee whatever."(*g*)

#### CAUTION FOR EXPENSES.

**12. Discretion to order Caution for Expenses.**—It will be convenient to take, first, the case of a pursuer, and to inquire in what circumstances he may be ordered to find caution for the expenses of the litigation he is conducting. Unfortunately this will be found to be to some extent a question of circumstances. There is no general rule, but each case is specially determined according to the discretion of the Court.(*h*) This discretion, however, is exercised according to certain principles. There is no case in which a pursuer in ostensibly good circumstances can be required to find caution; the question arises only when a pursuer has fallen into poverty, and here it is necessary to distinguish the two cases—of his having been obliged to part with, and of his still retaining, the real interest in the suit.

**13. Pursuer divested of Property and of Interest in Suit.**—When a pursuer has been divested of his property and of the management of his affairs by having been sequestrated

(*g*) A. S., 27th Jan. 1830; Alexander's Acts of Sederunt (1st series), p. 391. The Act of Sederunt enforces payment into bank only when the sum exceeds £10; but all sums should be so deposited. In Aberdeen sums below £10 are paid into an account-current, and each entry refers to the relative

order of consignment.

(*h*) *Carne v. Manuel*, 28th June, 1851, 13 D. 1253. In *Harvey v. Farquhar*, 12th July, 1870, 8 M. 971, a pursuer who had been ordered to find caution was allowed, on consigning a certain sum, to proceed without finding the caution.



under the Bankruptcy Statutes, or by having become insolvent in a process of *cessio*, or by having granted a private trust for behoof of his creditors, intimation<sup>(i)</sup> of the suit is made to the trustee, who has then the substantial interest.<sup>(j)</sup> If the trustee decline to come forward and take up the action, the question as to caution arises, and the pursuer will in general be ordered to find it before being allowed to proceed farther with his action.<sup>(k)</sup> When a trustee who has the power of claiming the benefit of the action for the creditors thinks so little of the merits that he will not claim, there arises a strong presumption against the goodness of the action; and there is no hardship in requiring a man who has no means, and who is suing for what really should belong to his creditors and not to himself, to find security before he puts a defender to trouble and expense.

To the general rule, however, exceptions will be admitted when there would otherwise be a denial of justice. For example, it would be hard to order caution to be found by a pursuer who held a judgment in his favour, but had become bankrupt during the course of an appeal. And the Court refused to order it where the party was suing the trustee (in whose favour he had divested), and certain others closely connected with him, for a slander and assault said to have been committed since the divestiture.<sup>(m)</sup> The Court again refused to order it

(i) There is no special way of making this intimation. It may be by letter.

(j) If there be no trustee, the intimation may be made to the creditors by calling a meeting to consider the claim; *Graham v. Mackenzie*, 3rd June, 1871, 9 M. 798.

(k) *Bell v. Anderson*, 25th Feb. 1862, 24 D. 603; *Gilchrist v. Proctor*, 25th Nov. 1847, 10 D. 149; *Horn v. Sander-*

*son*, 9th Jan. 1872, 10 M. 295. It does not matter that the divestiture is in security only; *Walker v. Wedderspoon*, 3rd March, 1843, 2 Bell's Appeal Cases, 57.

(m) *Heggie v. Heggie*, 6th June, 1855, 17 D. 802. Probably on the same principle a debtor might, without caution, bring an action calling upon the trustee for his creditors to account.

in the case of a party suing certain persons whose misconduct, he alleged, had brought about the poverty which had obliged him to divest, and against whom he had shown that he had a probable cause of action by getting himself upon the poor's roll.(n) There must be legal evidence of divestiture before the Court will order caution.(o)

**14. Pursuer not divested of Interest in Suit.**—So long as a pursuer has not parted with his interest in the result of the action, there will be great difficulty in making him find caution. Though there may have been a general divestiture by him of the rest of his property, if the particular matter at issue still belong to him he will not in general be made to find caution.(p) As he has the sole title to the matter in dispute, he ought not to be prevented from making good his right by want of funds. It requires, therefore, a strong case to make it necessary for a party in such a position to find caution. Mere poverty is not enough, even though the pursuer should actually be receiving parochial relief.(q) Being imprisoned for debt, even though coupled with bankruptcy, is not sufficient.(r) These are only misfortunes, and the right to the action remains unaffected.

But the Court have taken on themselves to exercise the power of ordering caution in certain cases where the kind of claim made was suspicious and the evidence of poverty at the same time strong.(s) Thus, a pursuer who had taken the step of

(n) *Weepers v. Pearson*, 21st Jan. 1859, 21 D. 305. See also *Burnett v. Murray*, 10th July, 1877, 14 S. L. R. 616.

(o) *Macqueen v. Murdoch*, 9th March, 1861, 23 D. 725. The Court here refused to take an unstamped deed in favour of a trustee as evidence.

(p) *Bell, supra*, note (k).

(q) *Macdonald v. Simpsons*, 7th March, 1882, 9 R. 696. The pursuer here refused to apply for the benefit of the poor's roll.

(r) *M'Laren v. King*, 8th Feb. 1834, 6 D. 1260, note.

(s) *Hunter v. Clark*, 10th July, 1874, 1 R. 1154. A suspicious circumstance in this case was that the pursuer though

retiring within the precincts of Holyrood, where he could not be apprehended for debt, was not allowed to sue an action of damages for wrongous imprisonment without finding caution. This conclusion, however, was not arrived at without some hesitation.(t) In another case, a pursuer, also in bankrupt circumstances, and who had threatened either to apply for sequestration or to retire to the sanctuary, was made to find caution before he was allowed to sue an action in which, as assignee of another, he proposed to re-open a question already decided against himself.(u) These illustrations are taken from a state of matters which cannot easily recur, imprisonment for debt and the escape from it to the sanctuary of Holyrood being in most cases things of the past; but they may still serve to show the grounds on which the Court may probably proceed. As an exception to the general rule against finding caution, would also be taken the case of a person who, though not actually divested, had commenced proceedings with a view to becoming so.

A pursuer suing an *actio popularis* is in a different position from a person suing a private action. He comes forward "to vindicate the rights of the public," his own patrimonial interest being usually small. Where he is a man of straw, as sometimes happens, with a committee behind him, he may be ordered to find caution, as it would be unfair to make the defender fight the case with a person who might receive costs but be unable to pay them.(v)

a pauper refused to attempt to get on the poor's roll, which would have had the effect of eliciting a report whether there was a *probabilis causa*; but this of itself would not have been enough. See Macdonald, *supra*, note (g); and Thompson v. North British

Railway, 14th July, 1882, 9 R. 1102.

(t) Samuel v. Greig, 12th July, 1844, 6 D. 1259.

(u) Maxwell v. Maxwell, 3rd March, 1847, 9 D. 797.

(v) Jenkins v. Robertson, 20th March, 1869, 7 Macph. 739.

**15. Case of a Defender.**—The defender is in a materially different position from the pursuer in regard to this matter of finding caution. There is no practice which will allow a pursuer to demand security for expenses from a person whom he has brought as defender into court.(w) There may, at the same time, be extreme cases in which exceptions might be made and caution required from a defender; for example, if a bankrupt, at a time when he was well and properly represented by his trustees, should take the case out of the trustee's hands and persist in going on with a vexatious litigation.(x) It was clearly a waste of time to ask a court to order caution in the case of a defender who held a judgment of an inferior court in his favour;(y) and even where a judgment stands against a defender, that will be no reason for ordering him to find caution in an appeal against it.(z)

**16. Amount of Caution.**—It seems to be a matter for discussion whether a party ordered to find caution should find it for all expenses, both past or future. In the First Division of the Court of Session it has been laid down that he is bound to find caution for those expenses only which may be incurred after the date of the order,(a) but in the Second Division it has been laid down that this was exceptional, and that the general rule was that caution should be found for all the expenses.(b)

(w) *Taylor v. Fairley's Trustees*, 1st March, 1833, 6 W. and S. 301. When imprisonment for debt was lawful, there was a recognised rule that a debtor suspending diligence against his person need not find caution, *Young v. Robertsons*, 13th March, 1875, 2 R. 599.

(x) *Per curiam* in *Taylor*, quoted in preceding note. Contrast *Robertson v. Henderson*, 19th Nov. 1883, 12 S. 70.

(y) *Bell v. Forrest*, 17th July, 1848, 2 D. 1460.

(z) *Weir v. Buchanan*, 18th October, 1876, 4 R. 8; *Buchanan v. Stevenson*, 7th Dec. 1880, 8 R. 220.

(a) *Ramsay v. Stanhouse*, 11th Dec. 1847, 10 D. 234; and *Maxwell*, *ut supra*, note (u).

(b) *Mackerray v. Muir*, 20th June, 1850, 12 D. 1057.

**17. When Caution is to be Renewed.**—The cautioner possesses (unless he specially renounce it) the right of retiring at any time, subject to remaining liable for expenses incurred while he held office. Should he exercise this right new caution must be found. In the same way, if the cautioner become bankrupt, and the caution thus (or in any other way) fail, in a case in which it has been decided that caution is necessary, the party must of new find caution.(c)

## MANDATARIES.

**18. When Mandatary Required.**—A pursuer or defender resident in a foreign country must, on demand, appoint or sist a "mandatary" to appear on his behalf, and to be responsible for the expenses incurred in the process, and for its general conduct. This rule is founded on usage. In its application there is room for distinguishing between pursuers and defenders. The pursuer must sist a mandatary, unless he can show good cause to the contrary. With the defender it is not a matter of course that he must sist a mandatary,(d) and the Court uses its discretion.(e) The rule applies to all persons, whether Scotchmen who have left this country or foreigners. So essential has the presence of a mandatary within the kingdom been deemed, that it has been held that a foreigner could not even be allowed, without sisting one, to appear to plead that he was not liable to the jurisdiction of the Scotch Courts.(f) But it is doubtful whether the rule would be so strictly enforced now, and foreigners have been

(c) *A B v. C D*, 29th Nov. 1836, 15 S. 158; but it will be different if the opposite party have induced the cautioner to retire; *Oliver v. Robertson*, 30th Oct. 1869, 8 M. 82.

(d) *Simla Bank v. Home*, 21st May,

1870, 8 M. 781.

(e) *North British Railway Company v. White*, 4th Nov. 1881, 9 R. 97.

(f) *Rankin v. Nolan*, 26th Feb. 1842, 4 D. 832.

allowed to plead objections to the competency of an action, without sisting mandataries.(g)

It is only recently that it has begun to be thought that England may in law not be a foreign country. After the passing of the "Judgments Extension Act, 1868,"(h) for making the judgments of the Scotch Supreme Courts effectual in England and Ireland, and English and Irish Supreme Court judgments effectual in Scotland, the English Supreme Courts set the example of not requiring Scotch suitors to find security for costs,(i) and the Court of Session has followed their example by releasing English suitors from the necessity for sisting mandataries.(j) These decisions proceeded on the ground that the judgment for costs would now be available against the party in his own country. As the principle of the Judgments Extension Act of 1868 is now applied by the Inferior Courts Judgments Extension Act of 1882, to Sheriff Court judgments, it should follow that English and Irish suitors are now equally relieved in the Sheriff Courts from the necessity for sisting mandataries.

The exceptions recognised in the case of persons who are not resident within the United Kingdom to the necessity for sisting a mandatory are few.

The decisions seem to imply that if the absence is to be of short and temporary character—for example, upon a business journey—a mandatory is not required. When such absences are frequent, the question is more difficult; and it would come to be a question of circumstances whether the person could or could not reasonably be said to be resident in the United Kingdom. When, however, such a person has to sist

(g) *Clark v. Campbell*, 12th Dec. 1874, 43 L. J. (Q. B.) 73.  
1873, 1 R. 281. Lord Deas dissented.

(h) 31 & 32 Vict. c. 54.

(j) *Lawson v. British Linen Co.*,  
20th June, 1874, 1 R. 1065.

(i) *Raeburn v. Andrew*, 29th Jan.

a mandatary, once for all is sufficient, and the mandatary does not require to be re-sisted on the occasion of each absence.(*k*) Scotch landed proprietors are not required to sist mandataries when the property is large enough, after allowing for the burdens, to meet any probable expense.(*l*) But they are not exempt if their title is under reduction.(*m*) The exemption of landed proprietors is altogether exceptional, and is not to be extended, for example, to the case of a person drawing an annuity from heritable property.(*n*) A mandatary cannot be insisted for on the absence of one of several parties who sue or defend on a joint title,—for example, where one partner is absent while the firm is suing for a company debt,(*o*) or where one of several trustees is absent during a litigation about the trust-estate.(*p*)

If a foreigner come to this country to reside while the litigation is going on, he escapes the necessity for sisting a mandatary.(*q*) It must be to reside, however, that he comes; and notwithstanding one case,(*r*) it is not sufficient that he find caution to attend the diets of the Court.(*s*) Foreigners are not exempted on the ground of bankruptcy, although the opposite party may gain somewhat if he get a solvent mandatary, instead of an insolvent principal, made liable for the costs.(*t*)

(*k*) *Scott v. Gillespie*, 29th Jan. 1823, 2 S. 165.

(*l*) *Caledonian and Dumbartonshire Railway v. Turner*, 21st Dec. 1849, 12 D. 406; *Fairly v. Elliot*, 19th Jan. 1839, 1 D. 399.

(*m*) *Sandilands v. Sandilands*, 31st May, 1848, 10 D. 1091.

(*n*) *Smith v. Strathmore*, 31st May, 1828, 6 S. 908.

(*o*) *Antermomy Coal Company v. Wingate*, 7th March, 1866, 4 M. 544.

(*p*) *Morrison v. Hutton*, 19th June, 1863, 4 M. 546.

(*q*) *Faulks v. Whitehead*, 3rd March, 1854, 16 D. 718.

(*r*) *Hopetoun v. Horner*, 5th March, 1842, 4 D. 877.

(*s*) *Railton v. Matthews*, 17th July, 1844, 6 D. 1348.

(*t*) *Overbury v. Peek*, 9th July, 1863, 1 M. 1058. It has been questioned, however, whether a mandatary for an insolvent is always liable for costs.

19. **Equivalents not Admitted.**—No equivalents to the sisting of a mandatary have been admitted. A foreigner whose funds in this country have been arrested is not excused.(u) Even the consignment of a fund to meet expenses will not be taken as a substitute;(v) although there is a case where a motion to have a mandatary sisted was refused when it was made at a late stage of the litigation, and where the party had a fund *in manibus curiæ* sufficient to meet expenses.(w)

20. **Want of Mandatary must be pleaded.**—The objection that a mandatary is required must be pleaded, the instance being held good so long as the objection is not stated. The foreigner may raise the action in his own name, and it is enough for him to sist the mandatary when required by the defender. A mandatary, however, is requisite before he can arrest on the dependence,(x)—an exception introduced to prevent parties not subject to the jurisdiction of the Scottish Courts from doing acts which might lead to damages.(y)

A party otherwise entitled to call for a mandatary may forfeit his right by not attempting to exercise it till the litigation is nearly at an end. In such a case, a motion for a mandatary will be refused if there is reason to believe that it is not made in *bona fides*, but for the mere purpose of getting delay.(z) A party may forfeit his right in other ways; for example, by raising up a personal exception against himself. If he have imprisoned the opposite party for debt in some

(u) Rankin, *supra*, note (f).

(v) Brown v. Lindley, 12th Nov. 1833, 12 S. 18.

(w) Buik v. Pattullo, 3rd March, 1855, 17 D. 568.

(z) Johnston v. Jendwine, 23rd Jan.

1813, F. C.

(y) Whether parties doing diligence must sist mandatories will be considered in treating of the execution which may follow on a decree.

(z) See Buik, *supra*, note (w).



foreign country, it has been held he cannot make the absence which he himself enforces a ground for asking a mandatory.(a) It follows from the principle that the objection must be pleaded that, if the opposite party waive it, the absentee can himself make no use of it, and cannot, therefore, ask to have the case delayed till he sist a mandatory.

**21. How Mandatory Sisted.**—Where a foreigner or absentee brings an action, the general way is for him to sue in the name of the mandatory in addition to his own name. If this be not done, or if the necessity arise on the defender's motion, a mandatory cannot be sisted without an order of court. When the order is pronounced, the absentee lodges a minute stating the name of his proposed mandatory. Along with the minute, a mandate (signed by the mandant) in favour of that person should be produced.(b) This mandate must be either holograph or probative, and it may be either a general mandate(c) (of the nature of a factory and commission) or a special mandate. It may be noticed that a factor holding a general mandate cannot name another person as mandatory.(d) In some cases the actual mandate may be dispensed with for a time. It is within the ordinary power of a law-agent, when his principal goes unexpectedly abroad, to sist a mandatory for him, so as not to delay the litigation;(e) but the principal's ratification (if called for) must be produced as early as practicable. In all cases the consent of the proposed mandatory

(a) *Robertson v. de Salvi*, 14th July, 1857, 19 D. 996.

(b) *Gunn v. Couper*, 22nd Nov. 1871, 10 Macph. 116.

(c) Compare *Smith v. Harris*, 3rd March, 1854, 16 D. 727.

(d) *Dempster v. Potts*, 18th Feb.

1836, 14 S. 521. If, however, he have a power of attorney to raise the particular action it is different; *Knight v. Freeto*, 19th Dec. 1863, 2 M. 386.

(e) *Elder v. Young*, 27th June, 1854, 16 D. 1003.

must be obtained. His consent will in general be presumed from the mandant's agent tendering him, and appearing on his behalf; but if the agent's right to do so be questioned, the proposed mandatary's written consent must be produced. When all this has been done, if there be no objection on the ground that the mandatary is insufficient, an interlocutor is pronounced sisting him, and then the matter is complete.(f)

These steps are not all indispensable. If a person acts as mandatary, calls himself by that name, and carries on a process in that character, he makes himself a mandatary. Thus a law-agent who designed himself throughout the pleadings as mandatary for his client was not permitted to say, on losing the cause, that he had never been rightly sisted.(g)

**22. Sufficiency of Mandatary.**—A mandatary is sufficient when he is solvent, and in the same position in life as the person whom he represents; and it is irrelevant to inquire whether he has funds enough to meet the expenses of the action.(h) Persons, however, who are insolvent, even though they may not be bankrupt, are not eligible as mandataries even for insolvent persons; and if a mandatary become insolvent during the currency of an action a new mandatary must be sisted.(i) When an objection to the sufficiency is stated, it is usual to remit to some competent person to inquire into the circumstances of the proposed mandatary, and to act upon his report without allowing proof in a formal manner.

(f) Sellar's Forms, vol. i. p. 274.

(g) Cullen v. Brown, 22nd May, 1860, 22 D. 1090.

(h) Railton v. Mathews, 13th Nov.

1844, 7 D. 105; M'Kinlay v. M'Kinlay, 10th March, 1849, 11 D. 1022.

(i) Harker v. Dickson, 8th March,

1856, 18 D. 798.

The mandatary must not be already a party to the process, as, for instance, a co-defender.(j)

**. 23. Liabilities and Rights of Mandataries.**—The mandatary is liable both for the expenses incurred in the process prior to the time of his becoming mandatary,(k) and for those incurred during the time that he acts.(l) If, however, his principal be on the poor's roll, he does not incur this liability.(m) It would appear to be doubted whether the mandatary of a person who was avowedly bankrupt at the time of sisting, necessarily incurs liability for expenses.(n)

Besides being liable for expenses, the mandatary is liable for the proper conduct of the litigation, and must see that the statutory and court regulations are observed; and he may be punished for breaches of these where the principal in the like circumstances would have been liable to punishment. In short, the mandatary has to represent within the jurisdiction the party who is beyond it.(o) The liability, however, for the proper conduct of the litigation, is one of no great importance, because, when a party is abroad, he is necessarily represented by a law-agent whose liability in this respect is of a more serious kind.

The mandatary seems to have no rights independent of those of the principal. He has not the power of acting without or against the authority of his principal even in the matters in which he incurs responsibility. It appears that he has no power analogous to that of a law-agent of carrying on

(j) *Barstow v. Smith*, 6th March, 1851, 13 D. 854.

(k) *Pease v. Smith*, 4th June, 1822, 1 S. 452; *Renfrew v. Glasgow Maga.*, 7th June, 1861, 23 D. 1003.

(l) *Lindsay v. Lindsay*, 8th Feb. 1827, 5 S. 310.

(m) *Middlemas v. Brown*, 9th Feb. 1828, 6 S. 511.

(n) See *Overbury v. Peek*, *supra*, p. 231, note (d).

(o) *Per Lord Deas in Overbury v. Peek*, *supra*.

a process after the principal has withdrawn, to the effect of getting a decision that expenses are not due.(p)

The legal liabilities and rights of the mandatary cannot be altered by the act of the parties. The mandatary, it has been laid down, must be sisted unconditionally, and must accept whatever position the law gives to him.(q)

**24. Withdrawal of Mandatary.**—The withdrawal of a mandatary should be by minute, and an order of court should be interponed to it.(r) The mandatary may withdraw at any time, and what is equivalent to a withdrawal may be effected also by the death of the mandatary or of the mandant. His liabilities are determined by the date at which he ceases to hold office.(s) The effect of the withdrawal is to oblige the mandant to sist a new mandatary. In the case of the mandant's death, the action is intimated to his representatives; and if they fail to sist themselves, decree may be taken against the mandatary for the expenses.(t)

#### EFFECT OF FAILURE.

**25. Failure to Consign, or Find Caution, or Sist Mandatary.**—When a party is ordered to make a consignation or to find caution, or to sist a mandatary, a time is usually fixed for his doing so, and the process (according to circumstances) may or may not be sisted till the order is obeyed. Failure to obey the order is treated as a default, but there has been a

(p) *Gordon v. Gordon*, 11th Dec. 1823, 2 S. 572.

(q) *Robertson v. Exley*, 24th Jan. 1833, 11 S. 320; *Renfrew*, *supra*, note (k).

(r) *Martin v. Underwood*, 8th June, 1827, 5 S. 783.

(s) He is of course liable for expenses up to that date, though these may not have been decreed for till after the withdrawal; *Erskine v. Watson*, 1st March, 1833, 20 S. L. R. 457.

(t) *Marshall v. Connors*, 16th Dec. 1848, 21 Jurist, 63.

difference in practice, in the case of a pursuer, as to what should be done when the default occurs. In some cases the action has been dismissed,<sup>(u)</sup> and in others the defender has been assoilzied.<sup>(v)</sup> The latter, although it may sometimes be a severe course, seems the more consistent with principle, as it is the ordinary consequence of other defaults, and as things might be no better in the new action were the first one simply to be dismissed.<sup>(w)</sup> Where it is the defender against whom the order has been pronounced, and who is in default, there is only one form of decree which can benefit the pursuer, and that is decree as prayed for, and it is it which will generally be pronounced.<sup>(x)</sup> If, however, there be a judgment standing against the pursuer, the Court has it in its power to refuse to give him the decree till it be satisfied that the judgment is wrong.<sup>(y)</sup>

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### Section III.—OF SISTING OR CALLING NEW PARTIES.

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| 1. <i>Omitted Pursuers.</i>            | 4. <i>Mode of Sisting or Calling.</i>  |
| 2. <i>Omitted Defenders.</i>           | 5. <i>Time for Sisting or Calling.</i> |
| 3. <i>Parties acquiring Interests.</i> | 6. <i>Effect of Sisting a Party.</i>   |

Sometimes in the course of a process it becomes necessary that new parties should engage in it as pursuers or defenders. This necessity may arise either from causes which were in existence at the date of bringing the action, or from causes which have come into existence during its progress. The

(u) *Wylie v. Adam*, 5th Feb. 1836, 14 S. 430; *Horn v. Sanderson*, 9th Jan. 1872, 10 M. 295.

(v) *Gordon v. Gordon*, 17th Dec. 1822, 2 S. 98.

(w) *Mackay's Practice*, vol. i. p. 464,

states that Court of Session assoilzies.

(x) *Robb v. Middlesex Ass. Co.*, 11th March, 1843, 5 D. 1025; *Sellar's Forms*, vol. i. p. 274.

(y) *Trodden v. Sweetman*, 16th July, 1862, 24 D. 1360.

situations are materially different, and require separate consideration. The rules in regard to both are in so far in the same category that they both rest upon case law, and not upon any definite regulations, and that both are governed by the same principles—the main difference being, that more latitude is allowed when parties are called in consequence of circumstances which have come into existence since the date of the petition.

It will be convenient to take, first, the case of parties who might originally have been called as pursuers or defenders, but who have been omitted; and then the case of those who have acquired interest since the beginning of the action.

**1. Omitted Pursuers.**—When new pursuers (who should have appeared in the petition) are required to make the instance good, there is frequently no ground of objection to the omission being supplied. Thus, if a minor raise an action without the consent of the curators, they may afterwards sist themselves. In like manner, if a wife raise an action with reference to her property in her own name, the husband may sist himself as a pursuer, and as consenting for his interest. So with companies; if the requisite number of individual partners be not named in the petition, they may sist themselves on the objection being pointed out. Omissions of this kind, which are almost accidental omissions, are readily permitted to be amended,—on payment always of any expense which may have been occasioned; and this course is much better than that of throwing out the petition with the prospect of having the action immediately recommenced.

Where all parties interested consent, a very wide margin indeed is given. There is a case where a person was allowed to invert his position. He should have been one of the

respondents in a petition, but having come forward as a petitioner, he was allowed, on all parties consenting, to go over to his proper side, and the proceedings went on as if no such mistake had been made.(a)

Where a party, who should have been pursuer, has been omitted because his consent to the proceedings could not be obtained, the question will arise, Whether it is competent to proceed with the action without him? Such questions arise when a party who has nominally the right to sue has divested himself of his interest in favour of some one who prefers not to appear. In such cases it is not in general necessary that the party really interested should come forward under the penalty of the action being dismissed, but if he fails to come forward on being required to do so, the defenders can insist that the actual pursuer should find caution for expenses.(b) Where the concurrence of the party who has been omitted is necessary to make the instance good, the pursuer must, if the objection be taken, get his consent to being sisted before the action can proceed.

It was at one time held that new pursuers could never be brought into a process without the consent of the defenders. This rule seems to have been applied only to the case of the proposed new pursuers being such as could have been conjoined originally, and also such as were independent of the original pursuers, and did not stand to them in any connected relation, like that in which a tutor stands towards his pupil.(c) It seems also to have applied chiefly to cases where the defenders

(a) Dalrymple, 10th Jan. 1862, 24 D. 288.

(b) Waddel v. Hope, 2nd Dec. 1843, 6 D. 160. Where caution is not offered, the action is dismissed; Fraser v. Dunbar, 6th June, 1839, 1 D. 882. See the

immediately preceding section, art. 13.

(c) See Fraser v. Duguid, 9th June, 1838, 16 S. 1180, where it was held competent without defender's consent to sist the assignee when objection was taken to the cedent's title.

were making no objection to the instance.(d) If the defenders object to the instance, it seems hardly reasonable to refuse to the pursuer the power, under proper conditions, of obviating the objection, but it seems settled that a new pursuer cannot even in this case be brought into the action without the defender's consent. Although it has been quite recently enforced,(e) it is more than doubtful whether this rule ought now to be acted on.(f)

**2. Omitted Defenders.**—New defenders are cited when the pursuer has failed to call all parties interested. This may be necessary when the defender is not *sui juris*, and the pursuer has omitted to call the person without whose authority the defender is unable to act;(g) or where there are others besides those called interested in the action;(h) or, lastly, where the actual defenders have relief against other parties. In the two first of these situations the pursuer may be appointed to cite the omitted parties, on his own motion on discovering the omission, or on that of the defender,(i) or *ex proprio motu* of the judge;(j) or the parties

(d) *Bryson v. Crawford*, 14th Nov. 1833, 12 S. 39; *Remington v. Bruce*, 2nd June, 1829, 7 S. 692.

(e) *Andersen v. Harboe*, 12th Dec. 1871, 10 M. 217. Here the Court was driven to the unfortunate result that where, in the initial writ, the name of one of two joint owners of a ship was given as pursuer, and that of the other omitted, the omission could not be supplied. See also Lord Watson's opinion in *Hialop v. M'Ritchie*, 23rd June, 1881, 8 R. (H. L.) 95.

(f) In *Morison v. Gowans*, 1st Nov. 1873, 1 R. 116, while the general rule about the incompetency of sisting new pursuers was maintained, a means of escape was devised by allowing the new

pursuer to be sisted "as a party concurring with the pursuer."

(g) *Thomson v. Livingston*, 14th Nov. 1863, 2 M. 114.

(h) *Thomson v. Gilkison*, 1st March, 1831, 9 S. 520 (partners who should have been called cited by supplementary summons); *Geddes v. Hopkirk*, 2nd June, 1827, 5 S. 747 (to the same effect).

(i) If the pursuer call them on defender's motion, and they be assolied, with expenses, the pursuers may, in the same action, obtain decree against the defender for those expenses; *Sym v. Charles*, 18th May, 1830, 8 S. 741.

(j) *Laird's Assignees v. Murray's*



interested may voluntarily apply for leave to appear.<sup>(k)</sup> The pursuer, however, cannot be obliged to call parties against whom defenders have right of relief,<sup>(l)</sup> or even (it is said) to consent to their admission into the process.<sup>(m)</sup> He is not bound (it seems) to discuss the questions at issue with any persons except those who are responsible to him,—leaving the defenders to make the best arrangement they can for their relief.

**3. Parties acquiring Interests.**—The introduction of new parties is frequently required in consequence of changes occurring in the course of the process. Thus, if the pursuer or defender die, his general executors,<sup>(n)</sup> or his successors in the immediate matter at issue,<sup>(o)</sup> may be made parties to the suit; or may make themselves parties to it, and that whether the opposite party consent or not. The right, however, is confined to persons who have a title of this kind. A person who has an independent right to sue cannot take up the action;<sup>(p)</sup> nor can a person do so who merely alleges a title, but who has not produced or established one.<sup>(q)</sup>

Where a party assigns his interest in the course of an action, the assignee may in general be sisted. Such assignments are either special or of the general kind involved in

Trustees, 24th Nov. 1836, 15 S. 120.

(k) Butchard v. Prophet, 18th June, 1841, 3 D. 1040.

(l) Binny v. Machray, 18th July, 1848, 10 D. 1508, where it was observed that the defenders might protect themselves by giving notice to the other parties.

(m) See opinions in Wishart v. Motherwell's Trustees, 12th June, 1851, 13 D. 1100.

(n) Neilson v. Rodger, 24th Dec.

1853, 16 D. 325; M'Culloch v. Hannay, 24th Nov. 1829, 8 S. 122.

(o) Duff, 22nd Nov. 1862, 1 M. 49; Kyle v. Kyle's Trustees, 30th Nov. 1821, 1 S. 171 (O. E. 180).

(p) Dobbie v. Cunningham, 18th June, 1843, 5 D. 1385. Person who had disbursed aliment not allowed to appear on claimant's death.

(q) Geikie v. Hutchison, 12th Jan. 1848, 10 D. 354.

sequestration or marriage. If the assignation be special, the assignee must appear; otherwise the cedent will be ordered to find caution.<sup>(r)</sup> It is the same with the trustee in a bankruptcy.<sup>(s)</sup> But in marriage, if the action be carried by it and the husband does not come forward when properly called, the title of the wife to sue or defend, as the case may be, falls.

New parties are sometimes required where the original party has had merely a temporary interest, which has ceased. For example, a landlord may appear at the end of a lease to carry on a defence against an action as to a question of possession which the tenant had abandoned on account of ceasing to have any interest.<sup>(t)</sup>

**4. Mode of Sisting or Calling.**—The usual method of sisting parties is by a minute being lodged for them, and by an order being pronounced thereon sisting them in the desired capacity. This is the only way in which pursuers are sisted. It is also very frequently followed in the case of defenders. It is the way new defenders must take when they themselves desire to appear; and even when their appearance is wanted by the other parties, they frequently agree to take that course on the action being intimated to them. When the persons wanted as defenders are unwilling to take that course, the pursuer must raise a supplementary action. The petition in it concludes that the new defenders shall be called as defenders to the original action; and when it comes into Court the cases are conjoined.<sup>(u)</sup> When executors refuse to appear on intimation, the supple-

<sup>(r)</sup> See *ante*, art. 1, note (b).

<sup>(s)</sup> See Kinnear on Bankruptcy, 2nd ed. pp. 124, 251, and authorities there cited.

<sup>(t)</sup> Douglas v. Dalhousie, 15th Nov.

1811, F. C. But see Laing's Sewing Machine Co. v. Norrie, 31st Oct. 1877, 5 R. 29.

<sup>(u)</sup> Bryson v. Muir, 23rd Nov. 1841, 4 D. 58.

mentary action is called one of transference. It is not advisable to dispense with the minute or supplementary action. When one of these is used, there seems no necessity for an amendment of the original petition ; but if the record be not closed, the titles of the pleadings are altered so as to include all the parties, and subsequent pleadings appear in the name of all.(v)

When a curator *ad litem* is appointed by the Sheriff, nothing more seems requisite than that there should be an interlocutor appointing him, and that he should appear in court and take and sign the oath or affirmation *de fidei administratione officii*.(w)

A formal sist may sometimes be dispensed with. If a party appear in a process in room of another, discuss the process, and obtain a decision on it, he will not be allowed, when it comes to the question of expenses, to say that he never was properly sisted.(x) In this case there can be no doubt of the party being barred from stating such an objection. What will be enough for that purpose must be a question of circumstances ; but not much seems to be required if the opinion that has been expressed be sound, that an appearance to ask a proof to be taken to lie *in retentis* was equivalent to a sist.(y)

Parties cannot be sisted conditionally. As in the case of mandataries, the parties sisted must be prepared to take all the responsibilities which the step itself involves. A minute craving that a party might be sisted, but adding a condition that he was to come under no liability for previously incurred expenses, was rejected.(z)

(v) Sellar's Forms, vol. i. p. 273.

(w) Sellar's Forms, vol. i. p. 267.

(x) Gill v. Anderson, 12th March, 1859, 21 D. 723 ; and see *ante*, p. 233, as to sisting mandataries.

(y) Cameron v. Gordon, 16th Feb. 1830, 8 S. 538.

(z) Wallace v. Eglinton, 2nd March, 1836, 14 S. 599 ; Ellis v. Ellis, 26th May, 1870, 8 M. 805.

**5. Time for Sisting or Calling.**—The proper time for sisting or calling a party who might have been originally included among the pursuers or defenders is before the record is closed. The step does not seem absolutely incompetent, however, after the record is closed; but instances of its being taken then are certainly uncommon, and the course is so inconvenient, as involving the necessity for opening up the record, that special reason will always have to be shown for it.

**6. Effect of Sisting a Party.**—When a party has been sisted, in whatever way it may have been done, he becomes to all intents and purposes a party in the same way as if he had been specially designed in the petition. Where he has been sisted in room of another, he is entitled to maintain all the pleas and is liable to all the objections which could have been stated by or used against his predecessor.<sup>(a)</sup> If the opposite party is to maintain, either that the party proposed to be sisted is not entitled to the rights of the original party, or is subject to further objections, he must state his pleas on those points before the party is sisted, and must have them disposed of or reserved by the interlocutor sisting. Unless they be stated before the sist, and then either disposed of or expressly reserved, the Court will not afterwards listen to them.<sup>(b)</sup>

<sup>(a)</sup> *Watt v. Scottish North-Eastern Railway Co.*, 20th Jan. 1866, 4 M. 318.

<sup>(b)</sup> See opinions in *Campbell v. Campbell*, 14th Jan. 1865, 3 M. 360.

Section IV.—OF AMENDING OR ADDING TO THE PLEADINGS.

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| 1. <i>Introductory.</i>              | 10. <i>Mode of Amendment.</i>                  |
| 2. <i>The Act of 1876.</i>           | 11. <i>Amendment by Supplementary Summons.</i> |
| 3. <i>Amendment Matter of Right.</i> | 12. <i>Appointments to Confess or Deny.</i>    |
| 4. <i>Competent Amendments.</i>      | 13. <i>Ordering Statements of Accounts.</i>    |
| 5. <i>Incompetent Amendments.</i>    | 14. <i>Res Noviter veniens ad notitiam.</i>    |
| 6. <i>Time of Amendment.</i>         | 15. <i>Time for stating Res Noviter.</i>       |
| 7. <i>Conditions of Amending.</i>    | 16. <i>Mode of stating Res Noviter.</i>        |
| 8. <i>Effect of Amendment.</i>       |  |
| 9. <i>Second Amendments.</i>         |  |

1. *Introductory.*—Prior to 1825, the power of amending the initial writ, or any of the other pleadings, was left to be exercised according to the discretion of the judges; but in that year the Judicature Act was passed, and a great degree of strictness was introduced. In the case of a pursuer, amendments of any kind were scarcely permitted, and after the closing of the record, he could hardly even correct an obvious error. If he went wrong with his action, his remedy was to give it up, pay all expenses, and begin again. In the case of a defender, to whom this remedy could not be made available, the strictness was perhaps hardly so great, but it was also very remarkable. This state of the law endured in the Court of Session till 1868, and in the Sheriff Court till 1876, when a considerable change was made. The decisions prior to those years are, therefore, now of no value, even for illustration. If any one cares to know what they were, he will find them fully enough explained in the former editions of this work. In the present edition, it will be sufficient to consider the subsisting statutory provisions, and such decisions as have been pronounced under them. The amendment of undefended petitions having already been considered (*supra*, p. 144), this section will deal only with defended actions.

**2. The Act of 1876.**—The provisions made by the Sheriff Court Act of 1876, (a) as to amendments, are (with the necessary verbal alterations) precisely the same as those contained in the Court of Session Act of 1868. (b) When analysed, they will be found to embody the following propositions :—

- (1.) Where there is any error or defect in the record, every amendment which may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be made; provided that—
- (2.) No larger sum or estate, and no fund or property other than that specified in the petition, shall by such amendment be made subject to the adjudication of the Sheriff, except with the consent of all the parties interested.
- (3.) The Sheriff may at any time make the amendment.
- (4.) The Sheriff may allow the amendment conditionally, upon such terms as to expenses or otherwise as he thinks proper.
- (5.) An amendment shall not validate diligence (used on the dependence of the action), so as to prejudice the rights of creditors of the defender who are interested in defeating it; but
- (6.) The amendment shall be operative to obviate objections to the diligence when stated by the defender, or by those obtaining right or title from him after it was executed.

**3. Amendment Matter of Right.**—A great change has here been made on the old law, as it stood both under the Judicature Act and before it. Under the old law, it was

(a) 39 & 40 Vict. c. 70, § 24.

(b) 31 & 32 Vict. c. 100, § 29.

always in the discretion of the Court to allow the amendment or not.(c) Under the existing law, if an amendment of any error or defect is proposed, and it be of the kind made competent by the Act of 1876, the Sheriff has no choice, but is bound to make it, and may be called upon at any time in the course of the action to discharge his duty in the matter. The only point upon which he has now a discretion is as to the terms as to expenses or otherwise upon which the amendment is to be made. This saves any discussion as to the expediency of making the amendment. A party has now an absolute right to make every competent amendment, and the only control the Sheriff can exercise is to see that the conditions which he attaches to the exercise of the right are such as shall render its operation just.

**4. Competent Amendments.**—The amendments which the Act of 1876 makes competent, are those which are necessary for the purpose of determining in the action the real question in controversy between the parties. For this purpose any error or defect in the record may be amended. As the expression "record" is wide enough to cover all the pleadings for both parties, it follows that an error or defect may be cured either in the initial writ or in any of the subsequent papers. The real question at issue, it has been held, is that which the petition intends to raise(d), and a decision which held that the grounds of action could not be enlarged is difficult to reconcile with the statute.(e) The grounds of

(c) In many cases, however, it is right to add that it was a discretion which had to be exercised in favour of the amendment; *Manson v. Dundas*, 13th Dec. 1870, 9 M. 272.

(d) *Gibson's Trustees v. Fraser*, 10th July, 1877, 4 R. 1001; *Forbes v. Watt's*

*Trs.*, 9th Nov. 1870, 9 M. 96.

(e) *Gillespie v. Miller*, 28th Jan. 1874, 1 R. 423. The proposed amendment was unnecessary, and possibly had it been necessary a different view of its competency might have been taken.

defence certainly may be enlarged ; and even so important an alteration as the addition of a defence, in an action for defamation, that the alleged slander was true, has been held competent.(f) Where an alteration on the grounds of action leaves the real question unchanged, the alteration is competent ; for example, in an action for breach of warranty, the statement that the warranty was in writing may be changed so as to say that it was verbal.(g) The conclusions may be varied, provided more be not asked. Thus, in an action for payment of a contract price, an alternative conclusion for damages may be introduced ; and, in like manner, to an action which originally sued for damages, an alternative conclusion for restoration of the subject, may competently be added.(h) Where new pleas in law are wanted, for example, where a continuing or amending statute requires to be cited, there is no difficulty in making the addition, as that might have been done under the old form.(i)

**5. Incompetent Amendments.**—Where an amendment would change the real question at issue, or bring under the adjudication of the Sheriff a sum or estate larger, or a fund or property other than that mentioned in the petition, the amendment is to be incompetent. Accordingly, it has been held that where a pursuer brought an action to enforce, and failed to prove a written agreement consisting of eight heads, he could not so restrict his claim as to enforce a verbal agreement consisting of one of these eight heads(j) ; and it has

(f) *Keith v. Outram*, 27th June, 1877, 4 R. 958.

(g) *Rose v. Johnston*, 2nd Feb. 1878, 5 R. 600.

(h) *Stewart v. Stewart*, 1877, decided by Lord Rutherford Clark, and reported *Mackay's Practice*, vol. i., p. 485.

(i) *Rankine v. Brown*, 24th Feb. 1858, 20 D. 672 ; *Colquhoun v. Caledonian Railway Company*, 10th July, 1852, 14 D. 997.

(j) *Gibson's Trs. v. Fraser*, *supra*, p. 247, note (c).



been held that a defender who maintained that a lease did not exist, could not, after its existence had been established, amend his defence so as to maintain that certain specified subjects did not fall within it.<sup>(k)</sup> Even though the amendment be proposed under the guise of a restriction, still if it change the real question at issue it is incompetent.<sup>(l)</sup> And although a party may always, so long as the question is not changed, abandon any of his grounds of action, he could not under the old system—and the reason is equally applicable under the new—make any condition that he was to be entitled to bring a new action to enforce them.<sup>(m)</sup> As a larger sum cannot be adjudicated upon, it unfortunately follows that a conclusion for interest cannot be added<sup>(n)</sup>; and as a different fund cannot be attacked, it would appear that if a party were brought into court as an individual, a conclusion to hold him liable as the trustee or executor of another would be incompetent.

**6. Time of Amendment.**—The time of amending under the new statute is any time during the course of the action. Thus amendments are often made after a decision on the merits by the Sheriff-Substitute, or in the Court of Session after decisions by one, or perhaps both, of the Sheriffs. The closing of the record interposes no obstacle, and even after proof has been led, amendments are competent.<sup>(o)</sup> In

<sup>(k)</sup> *Forbes v. Watt's Tra.*, *supra*, p. 247, note (c).

<sup>(l)</sup> *Paterson v. Robson*, 16th Nov. 1872, 11 M. 76.

<sup>(m)</sup> *Wilson v. Musselburgh Magistrates*, 22nd Feb. 1868, 6 M. 483.

<sup>(n)</sup> *Shott's Iron Company v. Turnbull*, 11th Jan. 1870, 8 M. 383.

<sup>(o)</sup> In *Arnott v. Burt*, 14th Nov. 1872, 11 M. 62, a pursuer who had concluded his proof on an allegation of forgery, was allowed to add an allegation that the deed had been insufficiently attested. In *Rose v. Johnstone*, *supra*, p. 248, note (g), which was an appeal from the Sheriff Court, the amendment

some cases opinions have been given from which it might be inferred that the nature of the amendment which was competent might be affected by the time at which it was proposed, but this view would seem hardly warranted by the statute. Under the statute the parties are entitled to have the real question between them determined before they quit the Court, and if a party proposes to raise a point at so late a stage as to cause the whole previous expenses to be thrown away, or as to raise the suspicion that he is fighting for delay, the proper course is to make payment of the whole previous expenses and consignment of the amount claimed, conditions of permitting the amendment. The last resource of all should be to send the parties *re infecta* out of Court, merely that they may begin again. The only limit, it would seem to me, which the statute could fairly have contemplated, would be that after judgment in the Inner House had been pronounced, whether signed or not, amendments should become incompetent.<sup>(p)</sup>

A limit of another kind is sometimes set to the power of amendment. Where an action has to be brought within a certain period, in order either that it may be brought at all, or that certain kinds of proof may be allowed, there is a great deal to be said for the view that the same period brings to a close the power of amendment. Effect was given to this view in a case decided in the Court of Session, and though the case was reversed in the House of Lords on another point, its soundness on this point was not challenged.<sup>(q)</sup> This point, however, depends upon considerations not connected with the law of process.

was made (after proof and judgment in the lower Court) at the Inner House debate.

(p) Mackenzie v. Munro, 17th March

1869, 7 M. 676.

(q) Mitchell v. Stewart, 1st Feb. 1838, 16 S. 409; and (as Thomson v. Mitchell) 28th July, 1840, 1 Rob. Ap. Ca. 162.

**7. Conditions of Amending.**—The Sheriff has an uncontrolled discretion as to the conditions on which he may allow an amendment to be made, whether as to expenses or “otherwise.” Under the word “otherwise,” the power to order caution or consignment must be included. When a case is competently appealed, the appellate judges may of course alter the conditions if they think them too lax or too severe, and in this their discretion is equally uncontrolled. It is seldom that any amendment is allowed, except upon payment of such expenses as may have been occasioned by the omission to state the matter in question in its correct form originally.

**8. Effect of Amendment.**—When the amendment has been permitted, the party is in the same position, unless some special condition to the contrary have been attached, as if the amendment had been contained in the original pleading—save always as to diligence. Where arrestment or other diligence (inhibition, for example) has been used on the dependence, it is provided that the amendment does not cure, so as to prejudice their rights, any defect on which the defender’s creditors might have founded. To affect prior creditors, the arrestments would have to be repeated, and then their effect would of course run from the date of repetition. Creditors in right of debts contracted, or persons whose title is acquired subsequent to the execution of the original diligence, and the defender himself, are affected by the amendment, which is declared to be operative to meet objections stated by them. In strictness, the statute should perhaps have made the amendment affect only those creditors who came in right of debts contracted after the amendment was made.(r)

(r) 39 & 40 Vict. c. 70, § 21.

**9. Second Amendments.**—Even under the old system, there never was any rule, though there was a strong prejudice, against second amendments, and cases are to be found where second(s) and even third(t) amendments were permitted. Under the new system, it is clear that no objection on this ground could be made.(u)

**10. Mode of Amendment.**—As the Act of 1876 makes no change on the mode of making amendments in defended cases, the old mode must be followed. Under it the amendment is proposed by a minute, on which parties are heard. If the amendment is allowed the Sheriff also allows (if it be necessary) an answer to it, to be added to the pleading of the opposite party, and this may, if it be long, be also embodied in a minute. An interlocutor is then pronounced permitting the amendment and answer to be added, and they are then added by the parties and authenticated by the clerk. Amendments are sometimes made in a less formal manner. Thus, in revising pleadings, additions are often made, which, strictly speaking, ought to be made by amendment, and if no objection be made at the time, none can be made afterwards. Indeed if a party, after an amendment has been irregularly made, allows the action to proceed as if it had been regularly made, he will in any case foreclose himself from objecting to it.(v)

**11. Amendment by Supplementary Summons.**—It has been said that it is incompetent to try by other devices to evade the rules as to amending. Thus it has been held that a supplement-

(s) *Brodie v. Young*, 19th Feb. 1851, 13 D. 737.

(t) *Hutton v. Douglas*, 1st March, 1851, 13 D. 804.

(u) *Per* Ld. Cowan, *Lynch v. Stew-*

art, 21st June, 1871, 9 M. 860.

(v) *Johnstone's Trs. v. Elliot*, 22nd June, 1824, 2 Shaw's Ap. Ca. 461; Sellar's Forms, vol. i. pp. 258, 262, and 266.

ary action concluding for interest on the sum claimed in the original action, is incompetent.(w) If the amount of interest be of importance, it has been said that the party must abandon his original action, pay expenses, and begin anew before he can recover it. If the amount does not, in his opinion, warrant this course, he must be content to lose the interest as the penalty of his neglect. These views must however be accepted now with great reserve, as supplementary summonses or petitions to bring before the Court claims(x) or persons(y) omitted in the original summons are matters of every-day occurrence.

**12. Appointments to Confess or Deny.**—Applicable to certain cases, there is a special power of pronouncing orders with a view to making the record specific. When the record has been closed, or at such earlier stage as the Sheriff shall think expedient, power is given to him to order the parties, or either of them, by writing under their hands, “to confess or deny” specified facts.(z) Where records are properly framed and construed this power seldom requires to be used. If a party fails in reply to a call upon him to confess or deny, he is held as confessed to such an extent as the Sheriff thinks just.

**13. Ordering Statements of Accounts.**—In some cases, such as those which depend on the result of an accounting, a record does not fully bring out the question at issue, and it may therefore be expedient that statements of accounts should be lodged. The Sheriff accordingly has it in his power to call on the parties to lodge statements of all accounts

(w) *Edinburgh & Glasgow Union* 1868, 6 M. 422.

*Canal v. Carmichael*, 27th May, 1842,  
1 Bell's Ap. Ca. 316.

(y) *Young v. Mitchells*, 12th June,  
1874, 1 R. 1011.

(x) *Roy v. Hamiltons*, 15th Feb.

(z) A. S., 10th July, 1839, § 66.

relevant to the matter at issue.(a) To clear up such matters further, he may also order objections to the accounts to be lodged, and then he may allow answers to those objections; and lastly, he may allow both the objections and the answers to be revised. Since 1853 it has been requisite to exclude argument from such pleadings.(b) The Act of Sederunt does not point out any particular stage of the process as the proper one for lodging such accounts and relative pleadings; but as the Acts of 1853 and 1876 contemplate that the first thing to be done in all actions is to make up the record, they should not in general be ordered till that has been done. There are cases, however, where to delay the accounts in this way would be to waste the record; and in cases where the right to see the accounts is not disputed there seems no incompetency in beginning by directing their production.

**14. *Res noviter veniens ad notitiam.***—Hitherto we have dealt with the modes of stating matters known, or which ought to have been known, to the parties at the time of lodging the pleadings which contained or should have contained them. The addition of matter coming to knowledge after the record has been closed is provided for by section 58 of the Act of Sederunt of 1839, which regulates the lodging of a “statement of any matter of fact or document *noviter veniens ad notitiam*, or emerging since the record was closed.”(c) Since the Act of 1876, this provision is seldom used, as *res noviter* is most frequently added by way of amendment, but the Act of Sederunt still provides the strictly accurate method for its

(a) A. S., 10th July, 1839, § 87.

(b) 16 & 17 Vict. c. 80, § 12.

(c) A. S., 10th July, 1839, § 58,

framed on the model of § 10 of the Judicature Act.

addition, and as there may possibly be cases where it may be advisable still to use it, it is proper that it should be described, and its competency discussed.

The provisions as to bringing forward *res noviter* will not be allowed to be used as a means for introducing new evidence, discovered since the proof was closed. If such evidence be discovered, its admission must be applied for by asking additional proof, and its admissibility will depend on the competency of allowing such proof.(d) In the second place, it is not enough to make a matter *res noviter* that the party simply did not know of it when the record was closed, Nothing is *res noviter* which it was in the power of the party to have discovered with ordinary care before closing the record.(e) Thus, it was held that the ignorance was inexcusable where attention had been directed to the matter by a defence in a former action ;(f) while, on the other hand, the ignorance was excused where the facts appeared from evidence withheld by the other party till the record had been closed.(g)

It has been supposed that there was a rule that documents recorded in the public records could in no case be founded on as *res noviter* ; but that is a mistake, and such deeds have been admitted.(h) It will, however, be an element in considering how far the party was excusably ignorant, and will raise a presumption against him.(i)

(d) Longworth v. Yelverton, 10th March, 1865, 3 M. 645.

1857, 19 D. 840.

(e) Per Lord President in Campbell v. Campbell, 10th Feb. 1865, 3 M. 501; Stewart v. Gelot, 19th July, 1871, 9 M. 1057.

(g) Bain v. Balfour, 1st June, 1838, 16 S. 1097.

(f) North British Railway Co. v. Brown, Gordon & Co., 12th June,

(h) Maitland v. M'Clelland, 2nd July 1857, 19 D. 945.

(i) Grahame v. Grahame, 14th June, 1825, 1 Wilson and Shaw, 353.

**15. Time for stating *Res Noviter*.**—By the Act of Sederunt it is made competent to tender a statement of *res noviter* at any time before final judgment is pronounced. A party may, however, foreclose himself from the right to make the statement if he delay to do so, after discovering the fact or document, until another material step in the process (such as a proof) has been taken.(j)

**16. Mode of stating *Res Noviter*.**—The mode of making a statement of *res noviter* is somewhat complicated. The party begins with a motion for leave to lodge it. The Sheriff then appoints him to give in a condescendence, stating in a first part, the alleged *res noviter*, and, in a second part, the circumstances under which it only recently came to his knowledge. The Sheriff may, if he see cause, appoint the other party to answer the second part. The Sheriff then determines, *upon proof or otherwise*, whether the *res noviter* is to be added. At the same time he determines, or specially reserves, the point of expenses. If he is of opinion that the *res noviter* ought to be added, he pronounces an order to that effect, and appoints the opposite party to answer the first part of the condescendence. The proceeding finishes by the record being closed of new upon the additional papers.(k)

(j) *Hansen v. Craig*, 16th July, 1858, 20 D. 1306.

(k) A. S., 10th July, 1839, § 53. This mode is equally applicable to the case

of a fact "emerging" after the record is closed. The forms will be found in Sellar, vol. i. p. 275.



## Section V.—OF ABANDONING, CONJOINING, AND SISTING ACTIONS.

### ABANDONING ACTIONS.

1. *Mode of Abandoning.*
2. *Time of Abandoning.*
3. *Minute of Abandonment.*
4. *Condition as to Expenses.*
5. *Requisite Interlocutors.*
6. *Whether Partial Abandonment competent.*

### CONJOINING ACTIONS.

7. *Power of Conjoining.*
8. *When proper to Conjoin—Case of Parties being the same.*

9. *When proper to Conjoin—Case of Parties not being the same.*
10. *Neither Parties nor Matters at issue the same.*
11. *Time of Conjoining.*
12. *Mode and Effect of Conjoining.*
13. *Of Disjoining Actions.*

### SISTING ACTIONS.

14. *Power of Sisting Actions.*
15. *Sisting to have Document Stamped.*

### ABANDONING ACTIONS.

The power to abandon an action, and to commence proceedings anew, is a power given to pursuers, to meet the case of their finding that the action has been mismanaged in some fatal respect, and to enable them to save the time that would be lost in going on to have the action dismissed, or to the still worse event of having a decision pronounced adverse to the claim. The power is considered to be under sufficient control when payment of expenses is made a condition of the right to abandon. There is no similar power to a defender who finds that he has mismanaged his defence.

**1. Mode of Abandoning.**—Before enrolment, the action may be abandoned by a letter from the pursuer, coupled with an express renunciation of it in the new action brought in its stead.<sup>(a)</sup> This renunciation ought to be contained in the new petition; but it is not too late if it be stated in the revival

(a) *Laidlaw v. Smith*, 8th March, 1834, 12 S. 538.

of the condescendence.(b) It is erroneous, however, to suppose that a letter alone is sufficient to effect the abandonment of an action which has not been enrolled.(c) It must be corroborated judicially in some shape. A minute tendered at the bar in the new action is enough.(d)

After enrolment, the abandonment of actions is, in practice, regulated entirely by the Act of Sederunt of 1839, though there seems to have been no express repeal of the old common law power of abandoning, which, before *litiscontestation*, was exercised by the pursuer passing from the instance on payment of the defender's expenses;(e) and, after *litiscontestation*, was carried out by pronouncing decree of *absolvitor*, and dealing with expenses as to the Court might seem right.(f) The common law powers are almost in disuse, and are of no consequence, because the remedy before *litiscontestation* is the same as in the Act of Sederunt; and the discretion which, after *litiscontestation*, was exercised in regard to expenses, was obtained at the cost of the pursuer having to submit to decree of *absolvitor*.

The provisions of the Act of Sederunt are, that "it shall be competent to the pursuer, before any interlocutor of *absolvitor* is pronounced, to enter on the record an abandonment of the cause on paying full expenses to the defender, and to bring a new action if otherwise competent.(g)

**2. Time of Abandoning.**—In the Court of Session the clause of the Judicature Act corresponding with the clause above

(b) *M'Anlay v. Cowe*, 13th Dec. 1873, 1 R. 807.

(c) *Per Lord Deas in Campbell's Trustees v. Campbell*, 3rd July, 1863, 1 M. 1016.

(d) *Nelson v. Gordon*, 26th June, 1874, 1 R. 1093. An award of expenses was here made against the pursuer.

(e) *Knows v. Irvine*, March, 1583, M. 12,125; *Carnousie*, 18th Dec. 1689, M. 12,134; *Stair* 4, 40, 8.

(f) *Jolly*, 10th June, 1625, M. 12,129; *Caledonian Iron Company v. Clyne*, 14th Dec. 1831, 10 S. 133; *Hare v. Stein*, 8th June, 1882, 9 R. 910.

(g) *A. S.*, 10th July, 1839, § 61.

quoted gives no power of abandoning till the record has been closed.<sup>(h)</sup> In the Sheriff Court there is no such limitation. In the Act of Sederunt passed in 1828, to carry out the Judicature Act, another limitation was put on the power of abandonment in the Court of Session, so as to make it incompetent to abandon not only after actual absolvitor, but after any interlocutor "leading by necessary inference to such absolvitor."<sup>(i)</sup> This limitation is not repeated in the Act of Sederunt of 1839. It is the actual pronouncing of judgment which ends the power, and though opinions may have been delivered fatal to the pursuer's case, he is in time to abandon so long as the terms of the interlocutor of absolvitor are not settled.<sup>(k)</sup>

**3. Minute of Abandonment.**—The pursuer must enter his abandonment on the record. This is done by minute.<sup>(l)</sup> Formerly it was common for the minute to contain an offer to pay expenses, and a reservation of right to bring a new action, but the Court of Session have decided that this is irregular, and that the minute in that court should simply be—"abandon this cause in terms of the statute." In like manner, the minute in the Sheriff Court should contain no qualification or reservation.<sup>(m)</sup>

(h) 6 Geo. IV. c. 120, § 10. The common law power was sufficient before closing.

(i) A. S., 11th July, 1828, § 115. Substantially, however, the provisions are the same; *Kermack v. Kermack*, 27th Nov. 1874, 2 R. 156. (The point settled in this case was, that a pursuer could abandon after an interlocutor limiting his proof to writ or oath.)

(k) *Western Bank v. Baird*, 20th

March, 1862, 24 D. 859.

(l) An agent should have express authority from his client to abandon; *Urquhart v. Grigor*, 12th June, 1857, 19 D. 853; *Orr v. Meikle*, 6th July, 1867, 39 S. Jur. 557; and *Mackay's Practice*, vol. i., p. 133. Abandonment is within counsel's power; *Duncan v. Salmond*, 6th Jan. 1874, 1 R. 329.

(m) *Adamson v. Guild*, 28th June, 1867, 6 M. 347.

**4. Condition as to Expenses.**—Payment of expenses is a condition precedent of abandonment. Though an interlocutor holding the action abandoned has been pronounced, the action will subsist till the expenses have been fixed and decerned for, and a new action will be incompetent until actual payment. If the defender delay to proceed to settle the question of expenses, the pursuer may consign a suitable amount, and the defender will be held in the new action as barred from objecting.<sup>(n)</sup> The case in which this was settled perhaps went too far in holding that it was sufficient to consign the amount after the new action had been brought. It has been held—and the necessity for the decision must be regretted—that a new action was incompetent because the summons was served on the day before decree for expenses was pronounced in the abandoned action; and that even accepting payment of those expenses did not preclude the defender from stating this plea.<sup>(o)</sup>

“Full expenses” in the Act of Sederunt mean the expenses as between party and party, without being subject to any modification, but do not mean expenses as between agent and client.<sup>(p)</sup>

**5. Requisite Interlocutors.**—In addition to the minute and the payment of the expenses, the abandonment to be complete requires to be sustained by an order of the Court. This is absolutely necessary, and if the Sheriff should mistakenly refuse to pronounce such an order the pursuer must appeal.<sup>(q)</sup>

<sup>(n)</sup> *Lawson v. Low*, 1st July, 1845, 7 D. 960.

<sup>(o)</sup> *Aitken v. Dick*, 7th July, 1863, 1 M. 1038. The principle was confirmed in *Kennedy v. Macdonald*, 12th June, 1876, 3 R. 818.

<sup>(p)</sup> *Lockhart v. Lockhart*, 15th July, 1845, 7 D. 1045.

<sup>(q)</sup> *Cormack v. Waters*, 28th Feb. 1846, 8 D. 889. (In this case the Sheriff refused to hold the action as abandoned till it should appear what had become of some steps of process which the pursuer's agent had withdrawn.) *Muir v. Barr*, 2nd Feb. 1849, 11 D. 488.

The proper form of order is, "to hold the action as abandoned under the condition and reservation contained in the 61st section of the Act of Sederunt of 10th July, 1839." The order should contain no other conditions or reservations.<sup>(r)</sup> It is unnecessary to "dismiss" the action; and wrong to pronounce absolutor. Sometimes the order is pronounced at once on the minute of abandonment being lodged, and sometimes not till after the receipt for the expenses has been produced, but there is no material difference between the ways, and though the latter seems fully the more accurate, the former seems that followed in the Court of Session.

**6. Whether Partial Abandonment competent.**—It has not been decided whether it is competent to abandon part of an action. After decree disposing of part of the conclusions has been pronounced, it would appear quite competent for the pursuer to abandon the remainder, as that remainder would then be the whole action before the Court; but the question is more difficult whether a pursuer can abandon a part of his action, go on with the remainder, and bring a new action as to the abandoned part? Of course he may restrict the conclusions of his summons, but the result of doing that would be, that the points cut out by the restriction would be held as given up by him. The difficulty is, whether he can so abandon part of the conclusions as to reserve right to bring a new action on them? and on that question the considerations of weight seem to be, that while the Act of Sederunt neither expressly authorises nor even contemplates such a course, to follow it would be to subject the defender to an accumulation of actions.<sup>(s)</sup>

<sup>(r)</sup> See *Western Bank v. Baird*, *supra*, p. 259, note (k).

*Musselburgh*, 22nd Feb. 1868, 6 Macph. 483, and *Hay v. Earl of Morton*, 6th

<sup>(s)</sup> See *Wilson v. Magistrates of* June, 1862, 24 D. 1054.

## CONJOINING ACTIONS.

**7. Power of Conjoining.**—When actions in Court depend between the same parties, or relate to the same matter, it is frequently desirable to conjoin them, so as to save trouble and expense. No special regulations have been made directing when or how this should be done. Each case is judged of by itself, and it is purely in the discretion of the Court to say when it should be done. In the Court of Session, where each Division and each Lord Ordinary forms a distinct Court, there is often used a proceeding, short of conjoining, called remitting *ob contingentiam*, by which connected actions enrolled before different judges are transferred so as to bring them before the same judge. The rules—partly statutory—under which this is done need not be considered here, because there is no practice (however useful it might occasionally be) of remitting causes from one Sheriff Court to another ;(t) and in the Sheriff Courts where there is more than one judge, the rolls are kept apart for convenience only, and causes may be transferred from one judge to another at the discretion of the Sheriff.

**8. When proper to Conjoin—Case of Parties being the same.**—If the parties are the same, there is such an obvious convenience in having the actions disposed of together that there will be a disposition to conjoin them if the subject-matter of the one is connected with that of the other, though the connection may not be very close. There must, however, be something to be gained by the conjunction, in the way of either shortening or simplifying the investigation and the settlement of the questions at issue; and it will not be

(t) There is an exception in maritime cases (which see *infra*), and in cases under § 46 of the Act of 1876, explained *supra*, pp. 75 and 76.

done if it is to prejudice the rights of either party.<sup>(u)</sup> Thus, though the parties were the same, and the subject-matter was almost the same, the Court refused to conjoin where the effect would have been to give the defenders the benefit in regard to the whole case of certain pleas which they had stated in the second, but had omitted to state in the first action.<sup>(v)</sup> Conjunction, in like manner, will be refused if it is to have the effect of giving to a party the benefit of a plea of compensation to which he is not entitled.<sup>(w)</sup> The motion for conjunction may be refused on grounds of expediency, as, for instance, if it be desirable to have the one action tried before, or in a different manner from the other.

**9. When proper to Conjoin—Case of Parties not being the same.**—Even though the parties be not exactly the same, actions as to the same matter may be conjoined if there be the prospect of great convenience in doing so, in the way of making one record or one proof serve for all. Thus two actions were conjoined where different pursuers were making the same demand on a defender.<sup>(x)</sup> Actions were also conjoined where the same pursuer prosecuted different defenders in regard to the same matter.<sup>(y)</sup> In the same way, counter actions may be conjoined, although the pursuers of the one may not be altogether the same as the defenders in the other, provided that both actions are such as to make it desirable to

(u) *Wauchope v. The North British Railway*, 6th March, 1862, 4 Macqueen Ap. Ca. 348.

(v) *National Exchange Company v. Drew & Dick*, 12th July, 1861, 23 D. 1278.

(w) *M'Leay v. Rose*, 17th Feb. 1826, 4 S. 481.

(x) *Lindsay v. Chapman*, 23rd Feb.

1826, 4 S. 490. The *Employers Liability Act*, 1880 (c. 42, § 6) contains a special power of this kind.

(y) *Buccleuch v. Cowan*, 23rd Feb. 1866, 4 M. 475; affirmed, 30th Nov. 1876, 4 R. (H. L.) 14. The defenders were charged with causing nuisances in a river at different stages of its course.

have all the parties in the field while settling each of them.<sup>(z)</sup> This principle does not apply where the second action is one of relief, brought by the defender of the first against some third party; for, though both actions are (in a certain sense) in regard to the same matter, the defender's liability in the first may depend upon quite different considerations from his right to relief in the second.<sup>(a)</sup>

**10. Neither Parties nor Matters at issue the same.**—If neither the parties, nor the grounds of action, nor yet the remedies claimed, be the same, the cases will not be conjoined; even though, in regard to each of these particulars, the actions should be closely connected. In such a case the difficulties of keeping separate what pertained to each action would more than counterbalance any saving gained by having a joint inquiry.<sup>(b)</sup>

**11. Time of Conjoining.**—Both actions must be in dependence and must be before the same Court. It is desirable, also, that they should both be at the same stage; and, if possible, this stage should be before closing the record. When they are not in the same stage the first action may be delayed until the second has been brought up. After a proof has been taken in one of the actions, it can only be in very special circumstances that it will be desirable to conjoin it with another, in which proof has not been taken.

**12. Mode and Effect of Conjoining.**—The mode of conjoining is by writing an interlocutor to that effect in both actions;<sup>(c)</sup>

(z) *M'Dowall v. Campbell*, 17th Feb. 1888, 16 S. 629.

Feb. 1837, 15 S. 494.

(a) *Mackay v. Greenhill*, 14th July, 1858, 20 D. 1251; *Gray v. Kerr*, 7th

(b) *Western Bank v. Douglas*, 20th March, 1860, 22 D. 447.

(c) *Sellar's Forms*, vol. i. p. 275.



and thereafter both processes proceed together. The interlocutors, after conjunction, are written on the interlocutor sheet of the principal action, or on a new interlocutor sheet, and all steps taken are applicable to both. Steps taken before conjoining remain applicable only to the action in which they have been taken, unless there has been an express consent or order at the time of conjoining that they should be applicable to both. In disposing of the conjoined actions all conclusions should be specially disposed of, so as distinctly to show what is done in each action.

**13. Of Disjoining Actions.**—Actions which have been conjoined may be disjoined at any time. For example, this has been done where it has turned out that it would be better after all to try one of them before the other.(d) If they have a joint record, it may remain the record in the leading action, and a new record may be made up in the other.

#### SISTING ACTIONS.

**14. Power of Sisting Actions.**—The power of sisting an action is a power by which the action is delayed until either the pursuer or the defender shall have taken some particular proceeding or until some decision has been given or some event has happened for which it is desirable to wait. It is always a question of discretion whether the Sheriff should sist, and the only general rule which can be laid down is that a sist will not be granted, unless its expediency be made clearly to appear.

The actions which it is competent to sist are usually petitory actions which a pursuer has brought too soon; for example, where he ought first to have brought a reduction

(d) *Turner v. Tunneck's Trustees*, 29th Jan. 1864, 2 M. 509.

to clear away some deed establishing the defender's right,(e) or to have brought a declarator,(f) or proving of the tenor,(g) to establish his own right. In such cases the first process is sisted for a reasonable period, to allow the pursuer to bring the requisite action. The same principle applies where a pursuer brings an action in circumstances where he ought to have waited for the completion of proceedings already in dependence,(h) or where there are other actions depending in Court which will settle the same point as that in which he is interested.

In other cases the power is exercised to enable the defender to bring an action to constitute some defence which he is not allowed to plead by way of exception. Here the process is sisted to allow the defender to bring the requisite action. The power of sisting must not, however, be used so as to give the benefit of pleas to a defender to which he has no right. It is, for example, incompetent to sist an action for a liquid claim till an illiquid claim is constituted; though, if the action for the latter be almost completed, there is a discretion to sist the former for a short period, on the authority of the maxim, *Quod statim liquidari potest pro jam liquido habetur*.(i)

Sisted actions may be revived by recalling the sist, which may be done either on the completion of the proceedings for which it was allowed, or on the failure of the proper party to proceed diligently with them.

### 15. Sisting to have Document Stamped.—Where either

(e) *Birrell v. Dundee Gaol Commissioners*, 26th Nov. 1856, 29 Jurist, 46; *McLaren v. Steele*, 13th Nov. 1857, 20 D. 48.

(f) *Louden v. Young*, 21st May, 1856, 18 D. 856. *Smellie v. Thomson*, 9th July, 1868, 6 M. 1024.

(g) *Officers of Ordnance v. Wood*, 8th March, 1825, 3 S. 629.

(h) *Girdwood v. Hercules Insurance Co.*, 2nd Feb. 1833, 11 S. 351.

(i) *Munro v. Macdonald's Executors*, 30th March, 1866, 4 M. 687. *Erakine* 3, 4, 16.

party produces and founds on a document which requires to be stamped before it can be looked at by the Court, it is competent to sist the action for a reasonable time, to enable the party to get the stamp affixed by the proper authorities. The better course, however, in general, is to pay the stamp-duty and penalties to the Clerk of Court, on the production of the document as evidence. This is done in terms of a provision in the Stamp Act of 1870.(j) It is not regular, however, at this stage to determine any question as to who is to be liable for the expenses of the post-stamping. These must be borne, in the first place, by the party who is obliged to found on the deed ;(k) though, if the deed be a bilateral one, and he succeed in his action, the Court may, and in general will, in dealing with the expenses of the action award to him the half of what the stamping has cost.(l) It will not, however, award him any portion of these expenses if the deed have been unavailing to make out his case, and be one to which the other party had no occasion to refer.(m)

(j) 33 & 34 Vict. c. 97, § 16, the first paragraph of which is in these terms:—  
 “Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on

other grounds.” The second paragraph directs the officer to grant a receipt for, register and report the payment. The third paragraph authorises the Commissioners of Inland Revenue to put a denoting stamp on the instrument.

(k) *Neil v. Leslie*, 19th March, 1867, 5 M. 634.

(l) *M'Donnall v. Caird*, 19th July, 1870, 8 M. 1012; *Wylie & Lochhead v. Times Fire Assurance Co.*, 15th March, 1861, 23 D. 727.

(m) *Hialop v. Thomson*, 20th March, 1878, 5 R. 794. The objection to the stamp cannot be waived or evaded; *Cowan v. Stewart*, 24th May, 1872, 10 M. 735.

## Section VI.—OF OCCASIONAL PROCEEDINGS IN THE WAY OF PROOF.

### JUDICIAL EXAMINATIONS.

1. *When Judicial Examination competent.*
2. *Time of taking Examination.*
3. *Mode of taking Examination.*
4. *Party Failing to Appear.*
5. *Effect of Admissions.*

### JUDICIAL VISITATIONS.

6. *How Judicial Visitations made.*
7. *Purpose of Visitations.*

### REMITTS TO REPORT.

8. *When competent to make Remit.*
9. *Remits not of Consent.*
10. *Remits of Consent.*
11. *Time for Remitting.*
12. *Of Objections and Answers to Reports.*
13. *Expense of Report.*

### COMMISSIONS TO TAKE EVIDENCE.

14. *When competent to issue Commissions.*
15. *Time and Mode of granting Commission.*
16. *How Witnesses cited under Commission.*
17. *Conduct of the Examination.*
18. *Circumducing Time for Reporting.*
19. *Reporting the Commission.*

### PROOF TO LIE IN RETENTIS.

20. *When competent to take Proof in retentis.*
21. *How Proof in retentis taken.*
22. *Effect of Proof in retentis.*

The way in which proof is usually taken has been explained, but there are certain auxiliary proceedings which require explanation.

Sometimes it is thought that if the parties are themselves examined in presence of the Judge as to their statements on record, proof may be avoided or shortened; and before the period at which it was made competent to examine the parties as witnesses such judicial examinations were in occasional use.

Occasionally questions occur as to localities and particular things, where it would facilitate the taking or understanding of a proof that the judge had seen them; and it is therefore necessary to say a few words as to the rules under which judicial visitations, as they are called, are conducted.

Instead of the Judge himself going to make such an investigation, he may—and this is the more common proceeding—remit to some person of skill to examine and make a report. This power is used also in cases where laborious investigations are required into complicated matters of facts which it is impossible for the Sheriff to undertake,—such as into the state of the accounts between two parties,—where it is expected that a careful examination by a skilled person may bring out or lessen the number of the points at issue.

With respect to the proof itself, it may happen that witnesses are unable to attend, and therefore it must be considered when it is competent to issue commissions to take their evidence, and under what rules such commissions are carried out.

Lastly, it is requisite to provide for an emergency which may occur, of there being danger that evidence may be lost before the arrival of the proper opportunity of bringing it forward. The way in which this is provided for is by issuing a commission to take the evidence to lie *in retentis*. Such a commission would precede in its issue any other commission or proof in the cause; but as what has been or will be said in regard to those others will leave little to be said as to this, it will be convenient to take the subjects in the order in which they are here mentioned.

#### JUDICIAL EXAMINATIONS.

1. **When Judicial Examination competent.**—Even before the Evidence Act of 1853 had—by rendering it competent (in most cases) to examine parties to a suit as witnesses—thrown judicial examinations into almost total disuse, their use was coming to be rare. They are hardly, if at all, used now. Even

in the kind of cases (such as filiation cases) where their use was formerly the most frequent, the practice of using them, except under very special circumstances, is condemned.(a) However, their use is still competent.(b) The rules concerning judicial examinations will be found principally in sections 66 and 67 of the Act of Sederunt of 1839.

It is in the discretion of the Judge to allow or refuse a judicial examination, and in general it will not be allowed unless there be some solid ground for suspecting the undue concealment of material facts by one or other of the parties,(c) and some reasonable expectation that the examination will throw light on them.(d) There are two cases, however, where it is incompetent to take a judicial examination if the party to be examined objects to it. The first of those is, where the party is being sued for some act for which he could be prosecuted as a criminal;(e) though if he be safe from punishment—for instance, from his having been taken as King's evidence—he is even here liable to examination.(f) The second is, where the proof is limited by law to writ or oath;(g) and here also there is an exception when there are circumstances of the kind which let in parole proof.(h)

## 2. Time of taking Examination.—The proper time for

(a) See the late Lord Gordon's remarks on it in *Scottish Law Mag. Reports*, vol. i. p. 171.

(b) See the reservation in the Evidence Act of 1853, § 6.

(c) See *A B v. C D*, 23rd Dec. 1843, 6 D. 346.

(d) A very full account of the law, clearly stated, will be found in *Dickson on Evidence*, §§ 1394-1404.

(e) *Nisbet v. Cullen*, 1st Feb. 1811, F. C.

(f) *Jantzen v. Easton*, 3rd Feb. 1814, F. C.

(g) *M'Master v. Brown*, 28th Jan. 1829, 7 S. 337; *Campbell v. Hill*, 29th Nov. 1826, 5 S. 54; *Little v. Smith*, 9th Dec. 1845, 8 D. 265.

(h) *Fell v. Lyon*, 16th Feb. 1830, 8 S. 543; *Campbell v. Turner*, 24th Jan. 1822, 1 S. 266; *Cairncross*, 6th March, 1824, 2 S. 774; cited in *Wilson's edition of Thomson on Bills*, p. 61.

taking a judicial examination is after the record has been closed and before proof has been ordered. It is not incompetent though it would be obviously unfair before closing the record; and after an order for proof had been pronounced it would be irregular, though its competency has been admitted.<sup>(i)</sup> After the examination of any of the witnesses it becomes still more irregular;<sup>(j)</sup> and it will not be allowed after the examination of the party in question as a witness,<sup>(k)</sup> or (still more clearly) after a reference to his oath.

**3. Mode of taking Examination.**—A time is fixed by interlocutor for taking the judicial examination. The party to be examined is appointed to attend personally, and answer such interrogatories as the Sheriff shall think proper. The examination takes place in presence of the Sheriff; but when he cannot attend, or in cases of special emergency, he has power to appoint a commissioner to act for him.<sup>(l)</sup> The party is not put on oath. In general the questions are put by the opposite party; but when he is done there seems nothing incompetent in the judge putting questions, either of his own accord or on the suggestion of the party's own agent. The statement is dictated to the Sheriff-Clerk, and is signed by the party in the same way as a deposition.

**4. Party Failing to Appear.**—If the party to be examined fail to comply with the order to appear, he is to be held "as

(i) *M'Kellar v. Scott*, 8th Feb. 1862, 24 D. 499; *Macintosh v. M'Kinlay*, 27th May, 1823, 2 S. 339, has been cited as showing the absolute incompetency of a judicial examination after an order for proof, but it was decided on the special terms of a remit.

(j) *Young v. Watt*, 19th Nov. 1747,

M. 6775; *Campbell*, p. 270, note (g).

(k) *Jameson v. Barclay*, 14th Jan. 1820, F. C.

(l) A. S., 10th July, 1839, § 67. The rules (contained in the Act of 1853) which limit the power of the Sheriff to appoint commissioners to take regular proofs do not apply.

confessed to such extent as the Sheriff may think just." Decree holding him as so confessed may then be pronounced; but the Sheriff may repon on cause shown, and on payment of such costs as he may fix.(m) When necessary, the Court may treat failures to appear, especially if repeated, as a default, and assoilzie the defender, or decern against him as the case may be.(n)

**5. Effect of Admission.**—The effect of an admission made by a party in the course of the judicial examination is not altogether equal to that of an admission on record.(o) If it were to be so treated, there might be a risk that a party of an easy disposition might be induced by a skilful cross-examination to give answers fatal to himself, and yet ill-founded; and, therefore, a party who tenders proof cannot well be prevented from showing that any admission he may have made was really founded on error.

#### JUDICIAL VISITATIONS.

**6. How Judicial Visitations made.**—It is competent for the Sheriff to visit and inspect the *locus* wherever he considers it desirable to do so.(p) This must be done in presence of the Clerk of Court and of both parties, and sometimes the Sheriff is accompanied by a man skilled in the particular matter in dispute. Should the inspection be made without the knowledge of one of the parties it would be irregular, and might disqualify the Judge; but it would not signify though one of the parties, after due intimation, should fail to attend. The Sheriff causes

(m) A. S., 1839, § 66.

(o) *Wilson v. Beveridge*, 9th Dec.

(n) *A B v. C D*, 2nd March, 1844,

1831, 10 S. 110.

6 D. 932; *M'Kellar*, p. 271, note (i).

(p) A. S., 10th July, 1839, § 83.



a minute of his examination to be made, which in general records merely the fact of its having taken place.

**7. Purpose of Visitation.**—The object of the examination is not to collect evidence, or (still less) to make the Judge a witness in the cause, but to enable the Judge to understand the evidence that has been or is about to be adduced. An inspection might be made the ground for *interim* regulation of possession, where that was matter of discretion, but it could not be made the foundation of a final judgment.

Visitations are not much in use in the Sheriff Court, as it is seldom that it is found to have been of any benefit for the Judge Ordinary to have seen things from a point of view which the Judges of Appeal are without the means of appreciating. In the Court of Session juries sometimes make inspections.

#### REMITTS TO REPORT.

**8. When competent to make Remit.**—The granting of remits to persons of skill to make reports is regulated by sections 88, 89, and 90 of the Act of Sederunt of 1839, by section 10 of the Act of 1853, and on the point of the agent's liability for expenses by Regulation 12 of the Act of Sederunt of 4th December, 1878.

It is incompetent for a Judge to delegate to another the duty of inquiry into the law, but it is competent for him to remit to make inquiries into any matter of fact, and here it is necessary to distinguish those remits which are, and those which are not, made of consent of both parties.

**9. Remits not of Consent.**—The object of remits, when not made of consent of both parties, is not to supersede proof but

to prepare the way for it. The Sheriff is not entitled to make a remit stand instead of a proof;(q) but as a preliminary to one a remit is often valuable, by getting information for the Judge, and possibly for the parties, in regard to the matters of fact at issue. Often it thus saves, in a complicated case, a great deal of trouble, and greatly shortens the proof.(r) A report, however, is not evidence, and it follows from what has been said that it cannot be made the foundation of a judgment, except perhaps for the purpose of regulating interim possession in those cases in which the Judge has a discretion in regard to that. A report can be made evidence by adducing the reporter as a witness in the course of a proof, and asking him to depone to its truth.(s)

**10. Remits of Consent.**—When a remit is made of consent of both parties to a man of skill to inquire into a matter of fact, the report supersedes proof, and is final on that point. It is necessary to notice that the Act of 1853 requires the consent of *both* parties. The proper evidence of the consent of the parties is a minute. There appears, however, no absolute necessity for that, provided the consent be otherwise made apparent, as it would be if the interlocutor bore to be of consent, and if both parties without objection allowed the reference to proceed. Even where no formal consent has been given, it has been laid down in the Court of Session that the award will be final if the parties either take no objection to, or acquiesce in, the interlocutor making the remit,(t) but as

(q) *Galbreath v. Taylor*, 20th Jan. 1843, 5 D. 423.

(r) Even in causes proper (in the Court of Session) for jury trial, a remit is often advisable; *Western Bank v. Baird*, 4th June, 1867, 5 Macph. (H. L.) 93.

(s) The practice of the reporter swearing to the truth of his report on its being lodged is obsolete.

(t) *Pearce Brothers v. Irons*, 25th Feb. 1869, 7 M. 571; *Wilson v. Struthers*, 10th Feb. 1837, 15 S. 523.

the matter is regulated in the Sheriff Court by an express enactment which seems to require an active consent, it is doubtful whether these decisions are applicable to Sheriff Court proceedings. In any case, however, it is desirable that care be taken, if the interlocutor makes any mistake on the point of consent to apply to have it corrected before it becomes final.

A remit "before answer" if made of consent, is nevertheless final as to fact, though it leaves the relevancy open.<sup>(u)</sup> Like other proceedings "before answer," it does not affect the competency of evidence, and if the reporter takes proof, he is limited to the taking of such evidence as would have been competent had the remit been made without using the words in question.<sup>(v)</sup>

**11. Time for Remitting.**—Except in very special cases the proper time for remitting is after the record has been closed and the preliminary pleas have been disposed of,<sup>(w)</sup> and before ordering proof. Remits should not be made before closing the record except in cases of great urgency. Where, for instance, the subject is of a perishable nature, it may be proper to have it examined earlier than at the usual stage. After proof has been allowed, it is doubtful whether a remit can be made, except of consent, for it is irregular to interrupt the proof, and unless the report is to be of the nature of evidence there seems no opportunity for getting it into the case. After the proof has been taken and closed it is still more objectionable to make a remit, except of consent, though it sometimes happens that a proof is left in so indefinite a

<sup>(u)</sup> *Galbreath v. Taylor*, 20th Jan. 1867, 6 M. 114.

1843, 5 D. 425.

<sup>(w)</sup> *Rose v. M'Leod*, 4th Dec. 1828

<sup>(v)</sup> *Robertson v. Murphy*, 7th Dec. 7 S. 140.

state as to make a remit to clear up certain points, very desirable.

**12. Of Objections and Answers to Reports.**—The Act of Sederunt of 1839 (§ 89) permits the Sheriff to allow objections to the report, and answers to those objections. It also permits him to order these papers to be revised, though this is never done. Such pleadings must contain no argument.(x) In practice, they are not much used, except when the report is that of an accountant; but occasions may arise where they will be found useful in narrowing the matters at issue.

**13. Expense of Report.**—Where remits have been made by the Judge at the regular stage, both parties are liable to the reporter, jointly and severally, for his remuneration, and that even though they should have objected to the remit.(y) Where, however, a remit has been made before the regular stage, at the instance of one of the parties, and with the view of preserving evidence for his benefit, it would appear right that, in the first instance, he only should be liable for the expenses. In the end they form part of the general expenses of the process.(z)

By the Regulations of the Act of Sederunt of 4th December, 1878 (§ 12), the agents are not (apart from special agreement), personally responsible to the reporter for his remuneration, the parties alone being liable.

The reporter has a lien on his report for his expenses, and the Court will not order him to lodge it until all his proper charges have been paid. If one of the parties have paid the reporter's charge, the Court will not, as a general rule,

(x) 16 & 17 Vict. c. 80, § 12.

1827, 5 S. 514.

(y) *Brown v. Gordon*, 2nd March,

(z) A. S., 10th July, 1839, § 90.

appoint the report to be lodged in process until the other party has paid his share;(a) but there may be special cases where the Court may order the report to be produced.(b) The amount of remuneration is fixed by the Court, and the reporter may appear in the process and get decree for it in his own name.(c)

## COMMISSIONS TO TAKE EVIDENCE.

**14. When competent to issue Commissions.**—Where proof has been allowed, it is competent for the Sheriff to grant commissions to take evidence in two cases only. The first case is where the witnesses are resident beyond the jurisdiction of the Court; and the second, where they are unable by reason of age, infirmity, or sickness, to attend the diet of proof.(d) In all other cases the granting of a commission is absolutely incompetent, and no excuse, however satisfactory,(e) and no considerations of convenience, however obvious,(f) can, *even with the consent of both parties*, make it competent. When proof has been taken by commission which ought not to have been so taken, the Supreme Court orders the proof (if it hold proof necessary) to be retaken. Even in the case where it is competent to issue a commission, it is not always advisable that the Sheriff should do so. Witnesses resident beyond the jurisdiction of the Court should be made to attend, unless there be decided hardship in that course. But as the power to the Sheriff to issue commissions in such cases is statutory, when to exercise it must be matter for his discretion.

(a) *Sutherland v. Goalen*, 24th Feb. 1855, 17 D. 509.

(b) *M'Queen v. M'Queen's Trs.*, 17th Jan. 1851, 13 D. 502.

(c) *See Brown v. Gordon, Milne v. M'Lean, and Sutherland v. Sprot*,

*supra.*

(d) 16 & 17 Vict. c. 80, § 10.

(e) *Byres v. Forbes*, 7th Feb. 1866, 4 M. 388.

(f) *Steuart v. Grant*, 29th March, 1867, 5 M. 736.

**15. Time and Mode for granting Commissions.**—Parties should move for commission and carry them out in such a way as to cause no unnecessary adjournments of the proof, and as little interruption to it as possible. In all cases the motions should be made before the diet for proving, so that if refused the party may do his best to get his witnesses to be present. It does not seem incompetent even at the diet for proving, to grant a commission to examine witnesses who have been expected to attend, but are unavoidably absent; but in that case the party, if he get it at all, should only get it on payment of the expenses, if any, occasioned by the interruption. When the motion is made and disposed of before the diet for proving, the taking of the commission can be arranged so as to cause the minimum of interruption; for example, by making commissions for the party who begins the proof be taken before it, and for the party who replies, after it.

The order allowing the commission should either fix the diet for taking the proof under it, or (and this is the usual form) should contain a provision that certain notice of it should be given to the parties. It also names the commissioner, either specially or by description. If the proof is to be taken within Scotland the Commissioner must be either the Judge-Ordinary of the bounds, or the Clerk of the Sheriff Court, or his acting depute; or a practitioner before any court of law of at least three years' standing; or a justice of peace, or other magistrate.<sup>(g)</sup> It is not necessary that the commission name the particular witnesses to be examined, though it is sometimes desirable either that it should do so, or that some other way should be taken of making the order *ex facie* limit the examination to such witnesses only as may competently be

(g) A. S., 10th July, 1839, § 69.

examined by commission. The order also fixes a time for the commission to be reported.

**16. How Witnesses cited under Commission.**—The provision for citing witnesses contained in the Act of 1853 (like that contained in the Act of 1838) seems applicable to the case only of their being required to attend the Court of the Sheriff. The attendance of witnesses required to attend commissioners appointed by Sheriffs seems to be enforceable only in the same way as witnesses can be forced to attend an arbiter. The party desiring the presence of the witness proceeds by summary application to the Sheriff within whose jurisdiction the witness resides to compel his attendance.<sup>(h)</sup> It is doubtful if a witness could be made to leave the jurisdiction of his own residence to attend a Commissioner.<sup>(i)</sup> If the commission be issued to some person in England or Ireland, the mode of making witnesses attend is contained in the Statute 6 & 7 Vict. c. 82. In Scotland, witnesses it would seem, may be cited to attend a commission either postally,<sup>(j)</sup> or in the way previously customary.

**17. Conduct of the Examination.**—At or before the diet fixed, the Commissioner *pro forma* accepts the commission. He then appoints a clerk, to whom he administers the oath *de fidei*. The Commissioner must attend and conduct the whole proceedings, and may either dictate the evidence to

(h) *Harvey v. Gibson*, 7th July, 1826, 4 S. 809. See also *Highland Railway Co. v. Mitchell*, 30th May, 1868, 6 M. 896.

(i) *Gordon & Neilson, Pet.*, 16th July, 1741, M. 634.

(j) This is not so clear as it ought to be. The Act 45 & 46 Vict. c. 77, § 3,

says witnesses may be cited postally "before any person having by law power to cite witnesses," and strictly speaking it is not the Commissioner, or even the Sheriff who has issued the Commission, but the Sheriff having authority where the witness resides, who has this power.

the clerk, *(k)* or cause it to be taken in short-hand. *(l)* If the proof be recorded in the old formal manner, it must be signed by the witness, Commissioner, and clerk, on each page, and at each marginal note. *(m)* Each witness—it is needless to say—must be sworn, but the fact must also be recorded. *(n)* The mode of taking proof in short-hand has already been described. *(o)* The examination is taken down in the form of a narrative, and sometimes, when necessary, both questions and answers may be noted. All must be done as briefly as may be, it being the duty of the Commissioner to repress all irrelevant or impertinent matter. *(p)* The Commissioner has the power to put such questions as he himself thinks necessary to elucidate the matter, and is directed to record anything unusual in the behaviour of a witness. *(q)* He decides on all objections to evidence except confidentiality, making a note of the objection, and signing his decision on it. When confidentiality is pleaded he should report the objection to the Sheriff. In cases of other objections, it is in his power, if he think proper, to take the challenged evidence on a separate paper, and to report it to the Sheriff in a sealed envelope, so that it may remain unopened until the evidence be found competent. *(r)*

**18. Circumducing Time for Reporting.**—If the report of the Commission be unreasonably delayed from any cause for

*(k)* A. S., 23rd June, 1852. There is no provision for taking notes of evidence in the Commissioner's hand, in the way proofs are taken under the Act of 1853 when the Sheriff writes them.

*(l)* 37 & 38 Vict. c. 64, § 5.

*(m)* Cleland v. M'Lellan, 22nd Jan. 1851, 13 D. 504; Dunbar v. Presbytery of Auchterarder, 11th Dec. 1849, 12 D.

284. The Commissioner signs for a witness who cannot write.

*(n)* A. B., 20th Feb. 1838, 16 S. 630.

*(o)* *Supra*, p. 182.

*(p)* A. S., 11th March, 1800, § 4 (quoted in Dickson on Evidence, § 2030).

*(q)* A. S., 11th March, 1800, § 7.

*(r)* Dickson on Evidence, § 2029.



which the party at whose instance it was granted can be held responsible, the Sheriff may circumduce the term for reporting. The effect of pronouncing this order is to make it incompetent for the party afterwards to ask to have the report received, and thus to cause him to lose the benefit of this method of adducing the evidence.

**19. Reporting the Commission.**—When the evidence has been all duly recorded the Commissioner sends the report of it to the Clerk of Court. He is not bound, however, to give it up until his remuneration and that of his clerk have been paid. These used to be fixed by the Act of Sederunt of 1st March, 1861, for regulating the fees of procurators. The Act of Sederunt of 4th Dec. 1878, which now regulates those fees repealed the former Act of Sederunt, but no new provision on this point appears to have been made. The Sheriff must therefore fix the remuneration of the Commissioner and clerk at such sums as appear to him to be reasonable.

PROOF TO LIE IN RETENTIS.

**20. When competent to take Proof *in retentis*.**—The only distinct regulation regarding the taking of proof to lie *in retentis* is contained in section 73 of the Act of Sederunt of 1839. The cases in which it contemplates the proceeding are where a witness is about to leave Scotland, and where the testimony of a witness is in danger of being lost on account of extreme old age or dangerous sickness.<sup>(s)</sup> Any witness may be examined in this way, including even the parties to the suit;<sup>(t)</sup> but before allowing a party to be so examined the Court may call upon the opposite party to waive his right to refer to the

(s) A. S., 10th July, 1839, § 73.

1873, 1 R. 237; Sheard v. Haldane,

(t) Hansen v. Donaldson, 27th Nov.

20th March, 1867, 5 M. 636.

party's oath,<sup>(u)</sup>—a right which would have been forfeited had the party been adduced by his opponent in an ordinary proof.<sup>(v)</sup>

The proceeding by which a party is enabled to preserve evidence with a view to a future action, is unknown in the Sheriff Court, though it seems competent in the Court of Session. In the Sheriff Court the process must be pending,<sup>(w)</sup> that is to say, the petition must have been executed before the application can be made.<sup>(x)</sup> If the application be made before the record be closed, the Court is more unwilling to grant it, and, unless the urgency be great, will delay the consideration of the application till afterwards.<sup>(y)</sup> This is done lest a party should try in this way to get pre-cognitions from his opponents to help him to state his case.

**21. How Proof *in retentis* taken.**—The application for such a proof should be in writing, and should set forth the names of the witnesses and the cause which is endangering the loss of their evidence. If the application be made before the record is closed, it must specify the facts or fact on which the witnesses are to be examined.<sup>(z)</sup> The parties are then heard orally, and the applicant must support by evidence of some satisfactory kind the truth of the alleged cause for the application. It is not meant that the Sheriff must have formal proof on this point. In the case of old age there should be a certificate; and in the case of sickness, the

<sup>(u)</sup> *Laing v. Nixon*, 25th Jan. 1866, 4 M. 327.

<sup>(v)</sup> 16 Vict. c. 20, § 5.

<sup>(w)</sup> See *Bryden v. Scott*, 14th June, 1825, 4 S. 87. A. S., 1839, *supra*, note <sup>(s)</sup>.

<sup>(x)</sup> *Cranston v. Ker*, 4th Feb. 1675, M. 12,091.

<sup>(y)</sup> *Laing v. Nixon*, *supra*.

<sup>(z)</sup> A. S., 1839, § 73, *supra*, note <sup>(s)</sup>. Sellar's Forms, vol. i. p. 270. A minute, not a formal petition, is sufficient in every case; and the facts may be specified as being contained in the condescendence or defences, without repeating them.

certificate of a physician or surgeon, or of the minister of the parish, must be produced.

If the application be granted, the evidence is usually taken before a Commissioner, in the same way as other evidence is taken on commission. The provisions in the Act of 1853 for taking proof do not seem to apply, and it is not expedient that the attention of the Sheriff should be directed to evidence containing possibly a mere fraction of the case. If the Sheriff himself were to take the evidence, it is plain that the practice of sealing it up (which is invariable) would, in so far as he was concerned, be reduced to an absurdity.

**22. Effect of Proof *in retentis*.**—Proof *in retentis* is taken under the reservation of all the pleas of the party against whom it is taken. By appearing under it, and cross-examining the witnesses, he is not held as having passed from any, even of his preliminary pleas, or even to have agreed to appear in the process at all, if he be objecting to the jurisdiction, or be entitled to time to consider his position in regard to that.(a) Further, the evidence cannot be used, except of consent, at the diet for proving, should proof ultimately be allowed, unless the witness is then incapable of appearing. If the witness can appear then, he must be brought forward, the proof taken formerly being regarded as merely a provisional kind of proof taken on an incomplete case. To save expense, however, it is permitted, and is usual, to hold the deposition as the evidence in the cause, on both parties consenting to that course.(b) As a general rule, the expense of a commission to take evidence to lie *in retentis*, which is not afterwards used, is borne by the applicant, it having been taken for his protection;(c) though

(a) *Moreton v. M'Donald*, 14th July, 1849, 11 D. 1417.

(c) *Couper v. Cullen*, 27th June, 1874, 1 R. 1101.

(b) *Dickson on Evidence*, § 1953.

there have been cases where, apparently because the improbability of the witness being ultimately able to attend was very great, it has been allowed.(d)

### Section VII.—OF THE REMEDIES AGAINST DELAY.

#### DECREE BY DEFAULT.

1. *When Decree by Default competent.*
2. *Nature of Decree by Default.*
3. *Reponing against Decree by Default.*

#### WAKENING ACTIONS.

4. *Action Falling Asleep.*
5. *How Wakened of Consent.*
6. *How Wakened not of Consent.*

#### PROCESS CAPTION.

7. *Nature of Process Caption.*
8. *When Process Caption competent.*
9. *Issue and Execution of the Warrant.*
10. *Stay of Execution.*
11. *Damages for Wrongous Execution.*

**Introductory.**—If it happens that one of the parties is willing to proceed and that the other will not, the former can use against the latter the sharp remedy of decree by default, in virtue of which the party who fails to proceed loses—if he do not forthwith make up for the default—his whole case, in the same way as if judgment on the merits had been pronounced against him. In the event of neither party going on with the case for the period of a year and a day, it “falls asleep,”(a) and certain formal proceedings known as “wakening” require to be taken before anything further can be done. The remedy which decree by default gives against delay is of value. What object is gained by letting the action “go to sleep” when it can so easily be “wakened” is not apparent.

Connected with the remedies against delay is a subsidiary

(d) *Graham v. Borthwick*, 12th June, 1875, 2 R. 812.

(a) *Watson v. Steuart*, 24th Feb. 1872, 10 Macph. 494.

power requisite to prevent a party, whose turn it is to move, from being impeded by his opponent making use of the privilege of borrowing the process to tie up his hands. The process caption is the very summary mode by which the return of borrowed processes is enforced, and therefore falls to be considered here, as being the remedy against the delays which this power of borrowing might otherwise be the means of occasioning.

## DECREE BY DEFAULT.

**1. When Decree by Default competent.**—A decree by default may be pronounced in two sets of circumstances,—namely for failure to lodge a paper, and for failure to attend a diet.

The Act of 1853 is still the Act which regulates what is to be done for default in lodging a paper. It directs the Sheriff where any condescendence or defences, or revised condescendence or revised defences, or other paper, is not given in within the periods prescribed or allowed, to dismiss or decern by default, unless it is made to appear that the failure arose from unavoidable or reasonable causes,—in which case he may allow the paper to be received on payment of expenses.<sup>(b)</sup> The application of this provision is now attended with difficulty. The condescendence being now attached to the petition, decree for default of it is now impossible; the defences under the Act of 1853 were lodged at a later stage than under the Act of 1876;<sup>(c)</sup> and it is doubtful whether the direction to the Sheriff-Clerk, contained in § 18 of the latter Act, as to what is to be done if revised papers are not lodged, does not supersede decree by default in their case. The only words of

(b) 16 & 17 Vict. c. 80, § 6.

18th Jan. 1879, 6 R. 541, as to effect of

(c) See *Bainbridge v. Bainbridge*,

this difference.

clear utility in the provision now are those dealing with "other papers," which means other pleadings. Thus, failing to lodge a minute may be treated as a default, if it be one dealing with the whole cause.(d) If the minute concern a particular point only, the better course seems to be to hold the defaulter as confessed in regard to it.(e) This, for example, is the remedy for failure to lodge productions.(f) It is a peculiarity in the statute of 1853, that the remedy it gives against a defaulting pursuer is to dismiss the action. Pronouncing absolutor would be the more natural and efficacious remedy, and would correspond better with the remedy provided by the Act against a defaulting defender, which is to decern against him.

At common law the Sheriff has power to pronounce decree by default where a party (after having appeared and lodged his petition or his defences, as the case may be) fails to continue his appearance, by himself or by an agent, at the necessary stages of the cause.(g) This common law power is made into an imperative duty on the Sheriff by the Act of 1876,(h) which prohibits him from granting delay except in the case of there appearing to be some sufficient reason for it. The cases of absence with which the Act of 1876 deals, are absence from (1) a diet of proof;(i) (2) a diet of debate;(j) or (3) other diet in the cause. The two former cases seldom give rise to any difficulty, but it is not clear what the statute meant to include under "other diet in the cause." Absence upon any occasion on which one of the parties may choose to enrol the

(d) *Rait v. Stewart*, 18th July, 1846, note.  
8 D. 1224.

(e) A. S., 10th July, 1839, § 66.

(f) *Caledonian Railway Co. v. Orr*,  
7th June, 1855, 17 D. 812; *Strachan*  
*v. Stuart*, 10th Nov. 1870, 9 M. 116.

(g) See *Erakine*, iv. 1, § 9, and *Ivory's*

(h) 39 & 40 Vict. c. 70, § 20.

(i) *King v. Gavan*, 26th May, 1880,  
17 S. L. R. 583; *Duff v. Stuart*, 17th  
Jan. 1882, 9 R. 423.

(j) *Robb v. Eglin*, 18th May, 1877,  
14 S. L. R. 473.

cause is clearly not enough ; and it seems doubtful now, though the practice was common, whether a mere enrolment can be made effectual to create a "diet" by an order appointing the party to appear then under certification.<sup>(k)</sup> It would seem that the word "diet" here means some occasion on which the presence of the party is required by statute or Act of Sederunt. It is not easy to say when such an occasion arises. The usual occasion for asking decree by default under this provision is when a party absents himself from the adjusting ; but this is a proceeding of doubtful competency, as there seems no imperative necessity why a party, who wants to make no change, and has no suggestion to offer, should then appear. The case of a party failing to appear as a haver<sup>(l)</sup> is not a case under the alternative in question, as that is absence from a diet for proving. Indeed, there is little to be found in the authorities to show what the statute meant, and decree by default for absence seems to be seldom taken except for the named alternatives of absence from proof or debate.

When the decree is asked for on the failure to lodge a paper, under the Act of 1853, there seems under the statute no alternative but to pronounce it. When asked under the Act of 1876, it seems also imperative, and it is also made imperative in this case though no motion be made. If, however, in either case, the party prefers going on with the cause to taking advantage of the default, it would seem that he can do so ; and this is sometimes done where it is of consequence to him to have evidence preserved. In such a case the interlocutor (if the party succeeds) proceeds on the consideration of the record or proof, as the case may be.<sup>(m)</sup>

<sup>(k)</sup> *Traill v. Andrew*, 16th Jan. 1877,  
14 S. L. R. 234.

<sup>(l)</sup> *Vickers v. Nibloe*, 19th May, 1877,  
4 R. 729.

<sup>(m)</sup> *Douglas v. Gibb*, 15th Feb. 1855,  
17 D. 434. See also A. S., 1839, § 59,  
and § 76, the provisions of which are  
nowhere expressly repealed.

**2. Nature of Decree by Default.**—Decree by default, though it may be pronounced in the absence of a party, is not a decree in absence. It is a decree *in foro*,<sup>(n)</sup> and becomes final, like other decrees of that kind, unless appealed against at the proper stage. Being an interlocutor disposing of the merits of the cause, it is appealable at once, and in the usual way.<sup>(o)</sup>

**3. Reponing against Decree by Default.**—When the case is heard on appeal, the decree by default is not recalled as a matter of right on making good the default.<sup>(p)</sup> It is in the discretion of the Judge to grant or to refuse the recall, and, if he grant it, to attach such conditions as to expenses as he thinks fit. If the principal Sheriff have refused to repon, the Court of Session will be very unwilling to go against his view.<sup>(q)</sup> If the decree has not been pronounced till after repeated defaults, the reponing may altogether be refused. When it is allowed, it is seldom done except on condition of paying all expenses occasioned; but this payment, on the one hand, may be dispensed with where the fault proves to be fully more with the other party,<sup>(r)</sup> and, on the other hand, may be increased by a sum to be paid as a penalty, when the mere re-imbursement of expenses would not replace the other party. There is no formal condition in the Sheriff Court that where the default

(n) *Boak v. Watson*, 14th July, 1860, 22 D. 1468; *Mackenzie v. Smith*, 26th June, 1861, 28 D. 1201.

(o) *Young v. Mackenzie*, 19th July, 1859, 21 D. 1358. The old method, by which the defaulting party appealed against the decree to the judge who pronounced it, seems to have been incidentally abolished by the Act of 1853. The appeal was by means of a reclaiming

petition, and that Act abolished all such reclaiming petitions, 16 & 17 Vict. c. 80, §§ 12 and 16.

(p) *Arthur v. Bell*, 16th June, 1866, 4 M. 841; *Anderson v. Garson*, 16th Dec. 1875, 3 R. 254.

(q) *M'Gibbon v. Thomson*, 14th July, 1877, 4 R. 1085.

(r) *Rutherford v. Beveridge*, 24th June, 1826, 4 S. 755.



has been in lodging a paper it must be tendered along with the appeal or the reclaiming petition ; but if it were not so tendered there would probably not be much chance of the recall being granted.

There is no absolute incompetency in reponing a party a second time, even for the same default, but the extenuating circumstances would require to be very special before a Sheriff would feel himself authorised to intervene a second time.(s)

#### WAKENING ACTIONS.

**4. Action Falling Asleep.**—An ordinary action in which no interlocutor has been pronounced during a period of a year and day, is held to have “fallen asleep.”(t) The meaning of this figurative language is that after so long a delay nothing can competently be done in the action, until the party desirous of moving has given certain notice, called “wakening,” to the opposite party. It would appear that although, as already explained, a petition which has not been enrolled stands dismissed after a year,(u) an action which is “asleep” cannot be treated as an action which has been dismissed. The Act of 1853 made an action, in which nothing had been done for six months, stand dismissed,(v) but as statutory authority was required for that, and, as that authority has been repealed, it must be taken as probable that if a new action were brought in place of a sleeping action, the Court would sustain the plea of *lis alibi pendens*. It would not be safe even to abandon the sleeping action until after it had been wakened,

(s) *Pearson v. M'Gaven*, 29th May, 1866, 4 M. 754 ; *Mather v. Smith*, 28th Nov. 1858, 21 D. 24 ; *Hamilton v. Christie*, 11th March, 1857, 19 D. 712.

(t) 39 & 40 Vict. c. 70, § 49.

(u) *Supra*, p. 135.

(v) 16 & 17 Vict. c. 80, § 15, repealed by enactment just quoted, § 48.

as it is doubtful if any interlocutor at all can be written until that has been done.

The period of year and day counts from the date of the last interlocutor. No step of procedure is therefore of any importance in this question unless an interlocutor have followed upon it, but any interlocutor is enough, and formal interlocutors have been known to be pronounced for the mere purpose of keeping actions awake. The year and day do not expire till the day following the anniversary of the last interlocutor. Thus a cause called on 12th January, 1779, was held awake on 13th January, 1780.(w) If the year and day expire on a holiday, the period is not thereby extended.(x)

Actions cannot easily fall asleep, except with the acquiescence of both parties and their agents. It is a position into which it is difficult for an action to get, unless there has been neglect somewhere, and as the proceedings for wakening (except when taken of consent of both parties) are in some respects very unsatisfactory, a careful agent should never allow an action to require it.

**5. How Wakened of Consent.**—If all the parties to the action are willing, the method of wakening the action is very simple.(y) All that has to be done is for them or their agents to subscribe a minute on the interlocutor sheet to the following or the like effect: "We the agents for the parties consent to the cause being wakened and proceeded with." Upon this being done it is competent (and therefore necessary) for the Sheriff to pronounce an interlocutor wakening the cause. This wakening is competent apparently at any time within the years of the long prescription.

(w) Mackay's Practice, vol. i. p. 491.      Feb. 1840, 3 D. 264.

(x) Lord Advocate v. Heddle, 16th      (y) 39 & 40 Vict. c. 70, § 49 (1).

**6. How Wakened not of Consent.**—Where the consent of all parties cannot be obtained, the party desirous of moving has apparently the choice of two methods of proceeding. The power of raising an action of wakening, given by the Act of Sederunt of 1839 (§ 101), was superseded while the provision of the Act of 1853 (§ 15), as to the dismissal of actions for non-procedure, was in operation, but it has never been repealed, and its use seems still competent. The method, however, of wakening, provided by the Act of 1876,<sup>(z)</sup> for the case in question is simpler. Under it, where a party desires to waken the cause, he enrolls it and lodges a minute craving that it be wakened. The Sheriff then directs intimation of this minute to be made (1) to the parties, and (2) on the walls of the Court, and (3) in certain cases, edictally. The intimation to the parties may be given to them or to their known agents, but it is advisable that the latter alternative should not be adopted without due consideration, as a question as to the subsistence of the agent's authority might easily arise. The Act being silent on the point, the ordinary mode of judicial intimation to the parties by a Sheriff-Officer, or under the Postal Citation Act, should be adopted. The intimation on the walls of the Court may be made in such way as the Sheriff thinks fit. Under the letter of the Act edictal intimation seems required in two cases, namely where the parties either have no known agents, "or" where they are themselves furth of Scotland. Probably the Act is here misprinted, and edictal intimation was intended to be given only when the parties had no known agents, "and" were themselves out of Scotland. As parties in Scotland who have no known agents must get personal intimation (under the previous words of the Act) edictal intimation to them would be an objectless super-

(z) 39 & 40 Vict. c. 70, § 49 (2).

fluity, to the omission of which no penalty could attach. But where parties are furth of Scotland there must always be edictal intimation, whether they have known agents or not. Whatever the Act meant that is what it says. This intimation is to be made by publication in the record of edictal citations. Nothing further is said, but it would be advisable, if the party to whom it was addressed had a known residence in England or Ireland (or elsewhere), to send him notice by registered post letter.(a) In the circumstances the party desiring to proceed cannot be too particular. This power of wakening in absence, like that of wakening of consent, may apparently be exercised at any time within the period of the long prescription, and it is more than doubtful whether Courts of other countries would recognise a decision pronounced in this country in an action wakened without any reasonable means being taken for the party abroad knowing anything about it. At the expiration of seven days from the latest intimation, and on a certificate of due intimation by the agent, the Sheriff may pronounce an interlocutor holding the action as wakened; and it then proceeds.

#### PROCESS CAPTION.

**7. Nature of Process Caption.**—All processes which are borrowed(b) are understood to remain in the hands of the borrowing agent, and to be returnable by him on demand. If the agent fail to return the process on demand, the failure is treated as of the nature of a contempt of Court, and a summary warrant, called a process caption, is issued for his imprisonment until it be returned. It is charac-

(a) *Ibid.* § 9, and *supra*, p. 122. Prudence would also suggest intimation to his known agent in Scotland, if he has any.

(b) As to the privilege of borrowing a process, see *ante*, p. 49 (in regard to procurators).

teristic that this extraordinary power is not regulated by any written rules of Court, but rests upon a practice, no doubt fairly well understood. Its use, however, is becoming rare; and it is being replaced by the practice of pronouncing orders appointing the borrower to return the process within a certain time, under the penalty of a fine, or of imposing the fine of £1, which is due under the Act of 1876, for the failure to return the process for any diet in the cause for which it is wanted.(c) There are cases however, where it is still found necessary to resort to the process caption.

**8. When Process Caption competent.**—A process caption is competent against every one who has borrowed a process and has failed to return it. It is the proper proceeding for forcing back a process which has been borrowed with a view to appeal, but has not been enrolled in the Appeal Court.(d) Where a long time has elapsed since the process was borrowed—a number of years for instance—caption is not the proper remedy. In such a case there is plainly no necessity for summary proceedings.(e) Although in general a receipt is given when a process is borrowed, and this receipt forms therefore the evidence on which the caption is usually issued, it is no objection to a process caption that it is used where the process had been taken without giving a receipt, because in such circumstances even a more summary remedy would not be unsuitable.(f) But as the object is solely to enforce the return of the process, it cannot be the proper remedy where it appears that the process has been

(c) 39 & 40 Vict. c. 70, § 21.

(d) *Scott v. Curle*, 8th June, 1841,  
2 Rob. Ap. 317.

(e) *Horne v. Steele*, 18th Feb. 1825,  
3 S. 550; and *Macleod v. Hill*, *infra*.

(f) *Watt v. Thomson and Ligert-  
wood*, 18th July, 1868, 6 M. 1112;  
27th Oct. 1871, 11 M. 960; and 21st  
April, 1874, 1 R. (H. L.) 21.

lost or destroyed. In such a case the party who has been injured is not without redress, but it must be obtained in some other way.

**9. Issue and Execution of the Warrant.**—The warrant is generally issued at the instance of the Clerk of Court, acting on the motion of the party aggrieved by the want of the process. The clerk may also apply *ex proprio motu*, and it is his duty to do so whenever it is requisite to have the process, or if he has reason to fear that the process may otherwise be lost or destroyed. It would appear also that the private party can apply to the judge in his own name, without the intervention of the clerk; but in that case he would be required to show what interest he had in having the process returned.(g)

In the usual case of the clerk applying for caption on the demand of the private party, the clerk should take care that this demand is signed either by the party or his agent. In some counties a book is kept for the purpose of containing caption craves. It is usual to send intimation of this application to the borrowing agent, with a notice that the warrant will be issued if the process be not returned within twenty-four, or it may be forty-eight, hours.

The warrant usually runs on the complaint of the clerk of court, but in some cases it is made to run on the joint complaint of the clerk and the private party.(h) When completed it is sometimes put into the hands of the complainer, who again intrusts it to an officer of court for execution; but the clerk is responsible, and is bound to

(g) *M'Leod v. Hill*, 16th Nov. 1826,  
5 S. 1. In Lanarkshire it is always  
the private party who makes the appli-

cation, Sellar's Forms, vol. i. p. 82.

(h) See *Livingstone v. Beveridge*,  
24th Nov. 1831, 10 S. 52.

instruct all the steps himself when required. In the Court of Session and in some sheriffdoms, it is the practice to include in the warrant both the agent who borrowed the process and the agent's clerk who signed the receipt for it, but it is not usual to execute the caption against the latter, and as he has not the control of the process it would require very special circumstances to justify such a proceeding.

**10. Stay of Execution.**—Where an agent has reason to fear that caption will be applied for, he may lodge a *caveat* against it with the Clerk of Court, the effect of which will be to secure him an opportunity for explanation before the caption is issued; but where caption is competent execution will not be stayed by a mere *caveat*.<sup>(i)</sup> The proper form of applying for stay of execution is by a note to the Sheriff—(not to the Court of Session, unless relief have been refused in the Sheriff Court)—and the note should contain an offer of caution or consignation.<sup>(j)</sup> The amount for which caution is to be found will be partly a matter of discretion. In some cases it will be enough to find caution for all damages which may be occasioned by the sist. In others the party may be required to find caution for all loss that may be occasioned by the non-return of the process.<sup>(k)</sup> In other cases, especially if there has already been delay, a sist on caution will be refused altogether.<sup>(l)</sup> On consignation of the full sum at issue, a sist for inquiry would scarcely be refused; but it would still remain for decision (on the result of the inquiry) whether the caption should finally be

(i) Patrick, 3rd June, 1854, 26 Jur. 459.

(k) Livingstone v. Beveridge, *supra*, note (k).

(j) Pagan v. Horsburgh, 14th Feb. 1835, 13 S. 471; Johnston v. Dunn, 22nd Feb. 1839, 1 D. 567.

(l) Fleck v. Bryce, 25th June, 1845, 17 Jur. 155.

recalled. The application for a writ is in general made by the borrowing agent, but where a person had (under a misapprehension) acted as the borrowing agent's clerk without authority to do so, he was allowed to make the application.<sup>(m)</sup>

**11. Damages for Wrongous Execution.**—Applications for process caption are made *periculo petentis*; and if the caption is carried through in circumstances which do not authorise it, the private party and his agent who enforced it are liable, jointly and severally, in damages to the incarcerated party.<sup>(n)</sup>

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#### Section VIII.—OF INTERIM DECREES.

The practice of pronouncing interim decrees in the Sheriff Court, though recognised by various Acts of Parliament,<sup>(a)</sup> is not governed by any special regulations, but is subject to the same principles as guide the Court of Session. Such decrees are pronounced either when the defender admits a sum to be due, or when it otherwise sufficiently appears that a sum is due by him. It is seldom expedient to pronounce an interim decree till the record is closed, but there is no absolute incompetency in doing so. In the Court of Session some doubt was entertained whether the clause in the Judicature Act,<sup>(b)</sup> prohibiting the Court from giving judgment on the

<sup>(m)</sup> *Black v. White*, 6th Dec. 1834, 13 S. 134.

<sup>(n)</sup> *Hunter v. Kerr*, 28th March, 1842, 4 D. 1175; *Horne v. Steele*, *ut supra*, note (c); *Pearson v. Anderson*,

18th July, 1833, 11. S. 1008.

<sup>(a)</sup> See, *inter alia*, 16 & 17 Vict. c. 80, §§ 13 and 24; and 39 & 40 Vict. c. 70, § 27.

<sup>(b)</sup> 6 Geo. IV. c. 120, § 4.



merits until the record was closed, did not prohibit an interim decree, but it was settled that it did not;(c) and in the Sheriff Court, where there is no such provision, the matter is clear. Where the defences therefore contain an admission of a sum due, interim decree for it is often pronounced. Where the pursuer is reputed to be solvent, it is not a sufficient reason for refusing interim decree that the defender would like to retain the sum to keep himself safe against expenses which may be incurred in the remainder of the process ; but the pronouncing of interim decree is to some extent matter of discretion, and there are cases in which very nice considerations may arise as to whether interim decree, even for an admitted balance, ought to be given.(d) Special leave is required to extract an interim decree, and that leave may either be embodied in the decree or given subsequently.(e)

(c) *Conacher v. Conacher*, 9th Dec. 1857, 20 D. 252.

(d) See *M'Alister v. Duthie*, 15th June, 1867, 5 M. 912.

(e) *Buchanan v. Young*, 13th Jan. 1860, 22 D. 371; and see *Taylor v. Jarvis*, 20th March, 1860, 22 D. 1031. Section 32 of the Act of 1876 which has been thought to dispense with this need for having leave regulates the time only and not the competency of extracting. In fact it is nothing but an amendment of § 68 of the Court of Session Act of 1868, and its effect is to reduce the period of twenty days there mentioned to fourteen. *Tennents v. Romanes*, 22nd June, 1881, 8 R. 824,

referred to by Mr. Sellar (Forms, vol. i. p. 389) as showing that leave is unnecessary was a case of a final judgment; and to quote § 32, as Mr. Sellar does, without giving its introductory words, is (I think) to leave out the part which explains its object and scope. The Court of Session practice cannot be relied on, as there special statutory authority (13 & 14 Vict. c. 36, § 28) has been given, authorizing all interim decrees to be extracted *ad interim*, unless the Court direct to the contrary. See memoranda of 7th Oct. 1874, issued by Court of Session Extractor, and printed in the Parliament House Book.

## Section IX.—OF JUDICIAL REFERENCES.

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| 1. <i>How Judicial Reference made.</i><br>2. <i>Time of Judicial Reference.</i><br>3. <i>Effect of Judicial Reference.</i><br>4. <i>Proceedings in Reference.</i> | 5. <i>Referee's Report.</i><br>6. <i>Reference becoming Abortive.</i><br>7. <i>Referee's Remuneration.</i> |
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A judicial reference is a proceeding by which the decision of a case is withdrawn from the Court, and submitted to one or more arbiters.(a)

**1. How Judicial Reference made.**—A judicial reference must be entered into with the consent of both parties. This consent must be embodied in a minute; and the agent requires special authority before he can consent for his client.(b) The minute refers the case to the decision of one or more arbiters, either specially named or (as is sometimes done) left to be named by the Court. If there are two arbiters, power should be given to choose an oversman, as otherwise the reference might become abortive by their differing in opinion. The reference may refer either the whole or a part of the cause,—subject always to the approval of the judge. The minute requires to have the authority of the Court interponed to it. Until this has been done the reference is incomplete, and it is in the power of either party to withdraw from it.(c) If, however, the interponing of authority have been accidentally omitted, and the parties have gone on with the reference, the subsequent proceedings will form a bar preventing either

(a) A very full and valuable account of the Judicial Reference will be found in Mr. Montgomerie Bell's *Treatise on the Law of Arbitration*.

(b) *Livingston v. Johnston*, 23rd May,

1830, 8 S. 594.

(c) *Reid v. Henderson*, 26th June, 1841, 3 D. 1102; Bell on Arbitration, p. 269 (2nd ed.)

party from founding upon the omission.(d) After authority has been interponed, neither party can withdraw from the reference or move the Court to recall it without the consent of the other.(e)

**2. Time of Judicial Reference.**—A reference may be entered into at any stage of a process which is before the Court.

**3. Effect of Judicial Reference.**—Notwithstanding the reference, the process remains in Court. It may be enrolled at any time for the purpose of pronouncing orders necessary to the carrying out of the reference—such as those giving warrant to cite witnesses, diligences to recover documents, and so on.(f) So entirely is the reference considered to be in Court, that it is only agents who can practise before the Court who can practise before the referee.(g) Under the rules as to falling asleep, if the process fall asleep it is more than doubtful whether anything can be done under the reference till it is awakened. There might be ground for arguing that proceedings in the reference were proceedings in the cause, and that an order by the referee would be equivalent in this matter to an interlocutor of the Sheriff, but it will avoid difficulties if the action be kept awake by some interlocutor being pronounced in it.(h)

**4. Proceedings of Referee.**—The first step of the referee is

(d) *Fairley v. M'Gown*, 11th Feb. 1836, 14 S. 470.

(e) *Walker v. Stewart*, 14th Aug. 1855, 2 Macq. 424.

(f) *Bell on Arbitration*, p. 276.

(g) *Ireland v. Wilson*, 25th June, 1851, 13 D. 1226. The point here involved was whether the agent required

to have the attorney license.

(h) See *Watson v. Stewart*, 24th Feb. 1872, 10 M. 494; and *Gillon v. Simpson*, 14th Jan. 1859, 21 D. 243, where the question arose under (the now repealed) § 15 of 16 & 17 Vict. c. 80. See also *Bell on Arbitration*, p. 282.

usually to accept the reference. This may be done by a docquet on the minute of reference, but it is not a necessary step, and often the only evidence of acceptance is acting.

The referee, if he considers it expedient, may appoint a clerk.<sup>(i)</sup>

If the reference have been made before a record has been closed, the referee may very generally take this as evidence that the parties do not desire further pleadings; but it is very much a matter of discretion what the referee may do in this respect; and so long as he acts fairly to both sides, and conscientiously, the Court will not interfere with him, unless, indeed, it should be made plain that he has omitted to order pleadings in a case where it was impossible to do justice without them.<sup>(j)</sup> If the referee does order pleadings, the best way for him will be to follow the style of record used in the ordinary Court. He may, however, confine himself to appointing each party to give in a claim, stating (without argument) the facts they aver and the demands they make; and if he thinks fit he may allow an answer to each party, or allow each party to revise his claim after he has seen that of the other.<sup>(k)</sup>

In regard to proof, the referee is again left very much to his own discretion. It is for him to consider whether he will allow proof or not; and if he act fairly and conscientiously, and not in such a manner as could only cause injustice, his decision cannot be quarrelled.<sup>(l)</sup> Even though proof have been ordered before the remit, the referee need not take it.<sup>(m)</sup>

(i) Bell on Arbitration, p. 274. In England he may also appoint a law-agent to help; *Potter v. Rankin*, 23rd Nov. 1868, 38 L. J. (C. P.) 130.

(j) Compare *Mitchell v. Cable*, 17th June, 1848, 10 D. 1297.

(k) Bell on Arbitration, p. 274.

(l) *Mowbray v. Dickson*, 2nd June, 1848, 10 D. 1102; *Miller v. Millar*, 10th March, 1855, 17 D. 689.

(m) *Colquhoun v. Haig*, 18th Jan. 1825, 3 S. 424.

If the reference have been made to him as a man of skill, he may decide of his own knowledge after examining the subject of dispute;(n) and if he examines witnesses on matters in which he is himself skilled, he need not examine them on oath.(o) If, however, he has to examine witnesses on matters in which he is not skilled, he should follow the rules in the ordinary court, unless the parties choose to dispense with any of the formalities; but it does not seem essential that he should proceed in this manner, for in this (as in all other matters) he is left very much to his discretion.(p)

Hearing the parties cannot in general be safely dispensed with altogether. It would vitiate the reference to hear one of the parties without either hearing the other or giving him an opportunity of being heard. It is, however, altogether in the discretion of the referee to say how often, and when, and in what manner, he will hear the parties. He may hear them by themselves, or he may allow agents, or even counsel, to appear for them; and he may have the argument either oral or in writing. Often the referee hears all that the parties have to say at the end of a proof or of an inspection, and this generally is sufficient.(q)

Notes of the referee's intended decision should generally be issued before pronouncing the decision itself. It is not imperative however to do so, and in cases of little difficulty or importance notes may rightly enough be dispensed with; but, as a general rule, the Court of Session has strongly recommended that they should be issued. If notes are issued, the

(n) *Johnston v. Chespe*, 10th July, 1817, 5 Dow, 247; *McDonald v. McDonald*, 8th Dec. 1843, 6 D. 186.

(o) *Cochrane v. Guthrie*, 30th March, 1861, 23 D. 865.

(p) See *Kirkcaldy v. Dalgairn's Trs.*, 16th June, 1809, F. C. Recording or

not recording the proof seems equally a matter of discretion.

(q) The discretion a referee has in regard to the debate depends on the same principles as those which regulate his discretion as to pleadings and proof.

parties should have an opportunity of expressing their views on them, either verbally or in writing.

The decision should embrace everything that is involved in the process. The referee, if he accept the reference, is bound to decide on both facts and law,<sup>(r)</sup> and to determine both the merits of the action and the question of expenses.<sup>(s)</sup>

**5. Referee's Report.**—The referee's final report is lodged in process, and the case is returned to the Clerk of Court. To make the report binding it requires to have the authority of the Court interponed to it.<sup>(t)</sup> The Court, however, cannot review the referee's decision.<sup>(u)</sup> If the referee have not exhausted the case, or if his report be ambiguous, or if he have omitted some step such as he ought to have taken, the report may be sent back to him, for him to amend according to his discretion;<sup>(v)</sup> or, if the proceedings of the referee have been altogether irregular or corrupt, such as would invalidate an ordinary decree-arbitral, the Court may set them aside altogether;<sup>(w)</sup> but the Court itself cannot amend or alter the award. The decision must be the referee's decision.

**6. Reference becoming Abortive.**—The reference falls by the refusal of the referee to accept, or by his refusal (on just grounds approved by the Court) to go on with the reference; or by his death. It also falls if the conduct of the referee has

(r) *Welch v. Jackson*, 23rd Dec. 1864, 3 Macph. 303.

(s) *Fairley*, *supra*, note (d); *Paul v. Henderson*, 19th Feb. 1867, 5 Macph. 618; *Ferrier v. Alison*, 28th Jan. 1843, 5 D. 456; 18th April, 1845, 4 Bell's Ap. Ca. 161; *Hilton v. Walker*, 2nd July, 1867, 5 Macph. 969.

(t) *Gillon v. Simpson*, 14th Jan.

1859, 21 D. 243.

(u) *Mackenzie v. Girvan*, 19th Dec. 1840, 3 D. 318, and 9th March, 1843, 2 Bell's Ap. Ca. 43.

(v) *Lord Advocate v. Heddle*, 9th July, 1856; 18 D. 1211.

(w) *Per Deas*, *Hilton v. Walker*, *ut supra*.

been such as to oblige the Court to recall his appointment. In case of the reference becoming abortive everything done in it goes for nothing, and the process recommences at the point where it stood before the lodging of the minute. This result can be prevented only by the parties consenting to some other course.

**7. Referee's Remuneration.**—The referee is an officer of Court, and is entitled to remuneration.(x) The amount is fixed by the Court, usually after a remit to the auditor. If one of the parties have already paid the referee a reasonable fee, the Court will order the other party to reimburse such part of it as he may be liable for.(y) In one case the referee left the proportion in which his fee was to be paid by the two parties to be fixed by the Court; but the Court remitted to the referee to fix the proportions.(z)

The clerk is also entitled to remuneration. The referee usually determines the amount, but as the clerk is an officer of Court the referee's decision on this would not necessarily be final; and, if the referee chooses, he may leave that matter to be dealt with by the Court, in the same way as his own remuneration is dealt with.

In case of necessity, the judicial referee and his clerk are entitled to ask decree in their own name for their remuneration, against both parties to the action, conjointly and severally.(a)

(x) *Paul v. Henderson*, 19th Feb. 1867, 5 M. 613.

(y) *Edinburgh Oil Gas Co. v. Clyne's Trs.*, 6th Feb. 1835, 13 S. 413.

(z) *Morris v. Stewart*, 14th Feb. 1852, 14 D. 501.

(a) *Beattie*, 19th July, 1873, 11 M. 954.

## Section X.—OF THE REFERENCE TO OATH.

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| 1. <i>Nature of Reference to Oath.</i>         | 7. <i>Form of Referring.</i>                             |
| 2. <i>When Reference to Oath Incompetent.</i>  | 8. <i>Of Retracting and Deferring.</i>                   |
| 3. <i>Discretion to refuse Reference.</i>      | 9. <i>Of the Examination.</i>                            |
| 4. <i>To whom Reference made.</i>              | 10. <i>Of Re-examining.</i>                              |
| 5. <i>Reference either General or Special.</i> | 11. <i>Of Parties failing to attend the Examination.</i> |
| 6. <i>Time of Reference.</i>                   | 12. <i>Of Construing the Oath.</i>                       |

**1. Nature of Reference to Oath.**—At any stage of most causes either party is at liberty to abandon other means of attack or defence and to tender a reference of the whole or any distinct part of the case to the oath of his adversary. This right remains even after the cause is lost, so long as the action remains in Court. The reference is considered to be an appeal to the equitable jurisdiction of the Court; and it is therefore in the discretion of the Court to sustain or to refuse it. It is understood, however, that the reference will be sustained when it is competent, unless there be good reason to the contrary. If it be sustained, it always forms the last step in regard to the matter embraced in it. The oath emitted is final in regard to the matter referred. If it admit the matter, the proof is complete, and if it do not admit, it is finally settled that the matter is not proved.

**2. When Reference to Oath Incompetent.**—The reference is occasionally incompetent.

To make a reference competent there must be, to begin with, a competent process. (a) If the action be not relevant a reference is incompetent; (b) and this is held though the

(a) *M'Farlane v. Watt*, 5th July, 1828, 6 S. 1095.

(b) *M'Laren v. Buik*, 20th June, 1829, 7 S. 780.



defect in relevancy be caused only by want of specification.(c) On the same principle, special matters which could not be admitted to proof, as not falling within the grounds of action, cannot be the subject of a reference to oath.(d)

Matters of law cannot be referred to oath. Where the record contains a mixed question of fact and law, the course is to make a special reference referring only the matters of fact at issue.(e) Sometimes this cannot easily be done, and the reference is then made general, the oath being held conclusive only on the matters of fact.(f)

Matter which may be made the subject of a criminal indictment cannot, if the referee object, be referred to his oath. Thus, in an action of damages for a serious assault, for which the defender would be liable to imprisonment in a criminal court, he can decline a reference.(g) If, however, the offence be one for which imprisonment is either incompetent or in practice not awarded, the reference will generally be sustained.(h) A party who means to avail himself of this privilege must plead it when the reference is proposed, because if he do not then object, the reference will be sustained.(i)

It has been doubted whether it is competent to refer matters of which the referee cannot personally know anything; but the doubt does not appear well founded. Though the party himself may not have knowledge of the matter, he may have received such information as may have quite satisfied him that

(c) *Phoenix Fire Insurance Company v. Young*, 10th July, 1834, 12 S. 921.

(d) *Thomson v. Simpson*, 13th Nov. 1844, 7 D. 106.

(e) *Taylor v. Hall*, 10th March, 1829, 7 S. 565.

(f) See *Anstruther v. Wilkie*, 31st

Jan. 1856, 18 D. 405.

(g) *Miller v. Brown*, 16th Feb. 1828, 6 S. 561.

(h) *M'Callum v. M'Call*, 18th Feb. 1825, 3 S. 551; and *Dickson on Evidence*, § 1549.

(i) *Conacher v. Conacher*, 1st March, 1859, 21 D. 597.

his claim or defence was unfounded; and though his adversary may not have legal evidence to defeat him, it would be unfair to lay down any general rule to prevent an appeal to his conscience.

**3. Discretion to Refuse Reference.**—It is not imperative upon the Court to sustain the reference. Even when the reference is otherwise competent the Court exercises a discretion to sustain or refuse; and if they see reason to believe that justice is likely to be perverted by the administration of the oath they will not give their authority.(j) This rule was applied in the case of *Longworth v. Yelverton*, where all the authorities were fully examined. The ground on which the reference was there refused was that the interest of a third party would be seriously prejudiced if the oath were affirmative.(k) The reference has been refused where it was apparent that the sole object was to get further delay; and in such cases, when the reference has been permitted, it sometimes has been only on some such condition as that the defender shall consign the amount at issue(l) or expenses.(m)

**4. To Whom Reference made.**—In general the reference must be made to all of the opposing parties in the action, though it sometimes happens that the oath of one of a certain set of parties may be binding on all of them, or even that the oath of one who is not a party to the action may be binding upon one who is. Thus, in certain matters, the oath of one partner may be binding on the rest, or the oath of a wife bind-

(j) *Ritchie v. Mackay*, 24th June, 1829, 3 W. and S. 484.

(l) *Pattinson v. Robertson*, 4th Dec. 1846, 9 D. 226.

(k) *Longworth v. Yelverton*, 10th March, 1865, 3 M. 645; 30th July, 1867, 5 M. (H. L.) 144.

(m) *Aikman v. Aikman's Trs.*, 24th Jan. 1868, 6 M. 277.

ing on the husband. Those cases, however, do not depend for their solution on the law of process, but on the power which the law of partnership, or the law of husband and wife, as the case may be, gives to the one party to bind the other in the transaction to which the action relates.(n)

**5. Reference either General or Special.**—A general reference is a reference of the whole action, and is the only kind of reference competent after final decision on the merits.(o) So long as there is no such decision, it is competent (with the approval of the Court) to make a reference of any individual fact or facts in the case.(p) Even after proof has been led, a party may ask for judgment in his favour upon the facts he has proved, and refer the remainder of the case to the oath of his opponent.(q)

**6. Time of Reference.**—It is irregular (if any objection be taken) to sustain a reference before closing the record and deciding on the relevancy, because until these things have been done it cannot be known whether the process is such as to make a reference competent. Doubts have been expressed whether it be competent in any case to admit the reference before the record is closed.(r) Under the old forms it was common to refer the summons alone.(s) and this is often done yet where no objection is taken ; but under the present forms of process either party could insist on a record being closed before any

(n) For illustrations, see *Bertram v. Stewart's Trs.*, 19th Dec. 1874, 2 R. 255, and *Kirkpatrick on Evidence*, § 198.

(o) *White v. Murdoch*, 9th June, 1812, F. C. Where the action is divisible into separate parts, one part may (even after judgment) be referred without referring the whole ; *Sinclair v.*

*M'Beath*, 1st July, 1869, 7 M. 934.

(p) *Moore v. Young*, 10th Dec. 1842, 5 D. 494.

(q) *Cameron v. Armstrong*, 28th June, 1851, 13 D. 1256.

(r) *Dickson on Evidence*, § 1554.

(s) *Stair*, iv. 38, 27. The reference was sometimes in the summons.

other step was taken.(t) The only check on the unreasonable use of this power is to find the party liable in the expenses of the proceedings if he exercises his right to a record without reasonable necessity. Sometimes the reference is made before the defender appears. In this case the order of reference has to be served upon him personally, and if he fail to appear and depone (being within the jurisdiction) he may be held as confessed.(u)

If preliminary pleas are stated, it is incompetent to refer to oath until they are disposed of. A defender who states such pleas cannot make a reference under reservation of them.(v) If a party who has stated preliminary pleas make a reference which is silent as to them, he will be held as having departed from them. In the same way, if the reference be proposed to the party stating the pleas, and he appear and depone, instead of exercising such right of appeal as was competent to him, he will be held to have waived the objections.(w) Sustaining a reference "before answer," though it has been done,(x) is a thing contrary to the nature of the proceeding. If there is any such urgency for taking the oath that it cannot await the disposal of the preliminary pleas, it should be taken to lie *in retentis*; (y) although, before this would be permitted the urgency would have to be very strong.

After parole proof has been taken it was at one time held that a reference could not be sustained; but that rule has long been in disuse. A party who has renounced probation is in the same position as a party who has led proof, and he

(t) *Riley v. M'Laren*, 24th Dec. 1853, 16 D. 323.

(u) A. S., 10th July, 1830, § 76; *Nicholson v. Macleod*, *infra*, note (h).

(v) *Henderson v. Smith*, 28th Feb. 1852, 14 D. 533.

(w) *Turnbull v. Bothwick*, 12th May, 1830, 8 S. 735.

(x) *Grant v. Marshall*, 17th Jan. 1851, 13 D. 500.

(y) *Riley*, *supra*, note (t).

therefore can also make a reference.(z) If, however, a party has called and examined his opponent as a witness, he cannot refer to his opponent's oath,(a) and though the opponent may have tendered himself as a witness in support of his own case, still if the party should cross-examine him, the power to refer is lost.(b) But this is not held to prevent a party, in an action which embraces two distinct matters, from examining his opponent as a witness on the one and referring to his oath on the other.(c) And if it turn out that the proof in the course of which the party was examined was incompetent, and that no use can be made of it, a reference is, notwithstanding it, competent.(d)

After extracting judgment reference is incompetent, but it is competent so long as the extract is not actually issued. This was held where the extract had been ordered for some time, but had not been issued on account of the pressure of other business in the office.(e)

**7. Form of Referring.**—A reference to oath ought to be tendered by a minute, and the agent tendering it must have special authority to do so. The evidence of this authority may be either the signature of the party on the minute or a separate mandate produced with it; or the party may attend the examination and judicially adhere to the reference.(f) If, through some mistake, the minute be omitted, the mistake will not be fatal to the reference if all the other forms have been attended to, and the intention of the party to refer, and

(z) *Anstruther v. Wilkie*, 31st Jan. 1866, 4 Macph. 493.  
1856, 18 D. 405.

(a) 16 & 17 Vict. c. 20, § 5.

(b) *Macleay v. Campbell*, 8th July, 1876, 3 R. 999.

(c) *Dewar v. Pearson*, 27th Feb.

(d) *Swanston v. Gallie*, 3rd Dec. 1870, 9 M. 208.

(e) *Aikman v. Aikman's Tra.*, 24th Jan. 1868, 6 M. 277.

(f) A. S., 10th July, 1839, § 84.

his knowledge of the reference, be clear from some such distinct act as his presence at the examination.(g)

After the minute, the next step is for the reference to be sustained by an interlocutor of the Sheriff. This step is imperative; and if the oath be emitted under anything less solemn than an express order of the Court it will not constitute a judicial reference.(h) When this interlocutor is moved for, any objection to the reference should be stated; for if the objection be not then stated the reference will be sustained and the objection be held as waived. This holds more especially when the objection is merely to so trivial a matter as the form of the minute.(i)

When the reference has been sustained, a day is assigned for the party to appear and depone. The oath is directed to be taken before the Sheriff, but if he cannot attend, or in case of special emergency, he may appoint a commissioner.(j)

**8. Of Retracting and Deferring.**—At any time before the oath has been emitted the party referring may be permitted to retract the reference on paying the expense which the other party has been put to by this change.(k) It is a condition, however, of permitting this, that the other party have not been prejudiced by what has taken place. If, for example, there have been great delay,(l) or if he have been deprived by death or otherwise in the interval of the evidence of a material witness,(m) the reference cannot be retracted.

(g) *Hewit v. Pollok*, 24th Nov. 1821, 1 S. (O. E.) 167.

(h) See the opinion of the Court in *Nicholson v. Macleod*, 23rd Nov. 1810, F. C.

(i) *Broom v. Edgley*, 31st May, 1843, 5 D. 1087.

(j) A. S., 10th July, 1839, § 79; and see

*Forman v. Bookless*, *infra*, note (z).

(k) A. S., 10th July, 1839, § 80; *Chalmers v. Jackson*, 18th Feb. 1813, F. C.; *Bennie v. Mack*, 28th Jan. 1832, 10 S. 255.

(l) *Dick v. Hutton*, 17th Feb. 1876, 3 R. 448.

(m) *Galbraith v. McNeil*, 26th Nov 1828, 7 S. 63.

Deferring is a proceeding (now almost unknown) by which a party to whose oath a reference has been made declines it, and refers the case back to the oath of the proposing party. The proceeding is still competent, and it is regulated in the same way as an original reference. When it is used, the judge has a discretionary power of ordaining either of the two parties to make oath who, he has ground to think, had the best opportunities of knowing the facts.<sup>(n)</sup>

**9. Of the Examination.**—When the parties appear before the Sheriff, the deponent is put upon oath.<sup>(o)</sup> The examination then proceeds at the instance of the referring party, who may ask such relevant questions as he pleases. So long as he keeps to the case, the only limit upon his discretion is the power which is given to the deponent to decline to answer special questions after having answered general questions—a power given to the deponent to prevent his being led into perjury by first answering general questions in the negative, and then being obliged to admit circumstances which contradict himself.<sup>(p)</sup> The deponent cannot decline to answer special questions when they are put first. The examining party may show to the deponent any documents which would be admissible were he being examined as a witness, and may examine him in regard to their contents.<sup>(q)</sup> The referring party is not bound to go over the whole case, but may stop his examination when he pleases. The Sheriff ought then to ask such questions as he may think right for

<sup>(n)</sup> *Stair*, iv. 44, 13; *Erskine*, iv. 2, 8.

<sup>(o)</sup> If the deponent has conscientious motives for not taking an oath, his affirmation may be taken: 28 & 29 Vict.

c. 9, § 2.

<sup>(p)</sup> *Hedde v. Baillie*, 16th Jan. 1841, 3 D. 370.

<sup>(q)</sup> *Boyd v. Kerr*, 17th June, 1843, 5 D. 1213.

clearing up the case;(r) and on that point he may receive suggestions from the deponent's agent. The deponent, it should be mentioned, is entitled to have an agent present, not only for the purpose of suggesting questions to the Sheriff, but also for the purpose of assisting his client with references to documents, and of objecting to incompetent questions.(s)

The deposition is recorded in the old way; that is to say, it is dictated by the Sheriff to the Clerk of Court, and then each page or marginal note is signed by the Sheriff and the deponent, in the same way as in the case of a proof by commission not taken in short-hand.(t)

**10. Of Re-examining.**—In certain cases it has been permitted to have the examination re-taken. This has been allowed where the first examination did not exhaust the reference;(u) where the deponent had not been examined in regard to certain statements in his record which it was desired to read along with his deposition;(v) where the deposition was confused or ambiguous;(w) or lastly, where, through an irregularity, the deposition had been emitted in the absence of the referring party.(x) The re-examination, however, will not, any more than the examination, be allowed as matter of right. It is, indeed, a very exceptional proceeding.

(r) *Soutar v. Soutar*, 5th Dec. 1851, 14 D. 140.

(s) *Blair v. M'Phun*, 4th July, 1856, 18 D. 1202. In modern practice he is allowed to cross-examine; *M'Dougall v. M'Laren*, 16th March, 1881, *Sellar's Forms*, i. 278.

(t) *Forman v. Bookless*, 27th Feb. 1864, 2 M. 787. It is competent in the Court of Session to take the deposition in short-hand (29 & 30 Vict. c. 112);

but the Evidence Act of 1874 has omitted to make that competent in the Sheriff Court (37 & 38 Vict. c. 64).

(u) *Paterson v. Thomson*, 20th Feb. 1830, 8 S. 571.

(v) *Young v. Pollock*, 25th May, 1832, 10 S. 570.

(w) *Erskine*, iv. 2, 15.

(x) *Peacock v. Smiles*, 5th July, 1828, 6 S. 1081.



**11. Of Parties failing to attend the Examination.—**

Should the party making the reference fail to go on with it, by taking a day for examining his opponent, the Court may circumduce the term for referring; and when this is done the party, if he do not get himself reponed against the order, loses his right to refer. If the failure to go on with the reference be without sufficient excuse, and the party takes no other steps, the Court might decide against him by default.(y) If the referring party, after getting a day fixed for the examination, fail to appear at it, the Sheriff may take the deposition in his absence.

If the party to whom the reference is made fail to appear at the examination, he may be held as confessed. If the diet, however, have been fixed in his absence, it must be proved that he or his agent received notice of the appointment before this can be done.(a) The effect of holding him as confessed is the same as if he had appeared and admitted the matters referred to him.

Parties may be reponed against circumduction, or holding as confessed, upon showing sufficient cause to the Sheriff for the failure, and on paying such expenses as he may modify.(b) No precise time seems to have been fixed within which the demand to be reponed must be made, but it should be made on the first calling of the cause at which the party is present; for if a party go on to litigate on other points, he

(y) See *ante*, section vi., art. 4, p. 271; and section vii., art. 1, p. 285.

(a) A. S., 10th July, 1839, § 76. A defender who had at the time no right of appeal against an interlocutor sustaining the relevancy of the action, absented himself, and deliberately allowed himself to be held as confessed for not attending a diet under a

reference to his oath, and then appealed. On the relevancy being re-affirmed, it was only *ex gratia* that he was reponed and allowed to depone; *Mitchells v. Moultrys*, 16th Dec. 1882, 20 S. L. R. 263.

(b) A. S., 10th July, 1839, §§ 81 and 82.

will necessarily be held as having waived his claim to be reponed.(c)

**12. Of Construing the Oath.**—After the oath has been taken, the only question in the cause, in regard to matters embraced under the reference, is what has been sworn. There is no room for questioning whether the oath is true or false, or whether it be consistent or inconsistent with other statements made by the party, either on record or in letters or other writings under his hand. And there is no room for either explaining, supplementing, or detracting from the oath by such statements. If it be desired to have benefit from such statements, they must be incorporated in the deposition, by putting them before the deponent at the examination, and examining him in regard to them. It is not enough, however, to examine him as to whether he authorised or wrote them; he must be examined as to their contents; and where they admit of explanation, his explanation of them, whatever it may be, has to be accepted in the process as true.(d)

Where the deposition is ambiguous or contradictory, the Court must interpret it so as to obtain its true meaning, though that possibly may not be the meaning which the deponent would like to have attached to it. If the deposition contain materials sufficient to show that the debt is due, the oath will not be held as negative because the deponent has

(c) Compare *Grant v. Macgregor*, 20th June, 1839, 1 D. 1048, where the Court refused to repon the representatives of a deceased party who, when in life, had neglected to get himself reponed.

(d) *Gordon v. Pratt*, 24th Feb. 1860, 22 D. 902. "The rule is simply this, that you may make documents part of

the oath on reference, but in order to do this you must examine the party specifically on these matters; yet when that is done, it is not necessary to engross the whole documents, a reference to them being sufficient;" *Jackson v. Cochrane*, 27th Feb. 1873, 11 M. 475.

said that it was not due in answer to the general question.<sup>(e)</sup> The principles to be recollected in interpreting are, that the oath is to be assumed as true, and that, even though it should be very apparent that it is false, it is the only evidence which can be looked at, and that the burden of the proof is on the referring party. But while the oath is to be taken as conclusive on all the matters referred, it is not to be held as conclusive in regard to everything which a deponent may choose to say. This makes it necessary to distinguish between intrinsic and extrinsic statements—that is to say, between statements relating to the matter at issue and statements which do not relate to it. The nature of this distinction can best be illustrated by an example. In an action for debt everything relating to the constitution or the subsistence of the debt claimed is intrinsic to the oath, while a statement as to every other debt is extrinsic. Thus a statement that the debt claimed was compensated by a different debt, is extrinsic ;<sup>(f)</sup> while, on the other hand, a statement that there was a transaction in which it was agreed that the debt claimed should be set against the other, and be held as discharged, is intrinsic.<sup>(g)</sup> In the former case the only way is to give decree for the debt sued for, and to allow the deponent to sue in like manner for the debt due to him. In the latter case the oath is held as negative of the reference.

(e) *Grant v. Wishart*, 17th Jan. 1845, 1855, 17 D. 1081.  
7 D. 274.

(g) *Cowbrough v. Robertson*, 18th

(f) *Thomson v. Duncan*, 10th July, July, 1879, 6 R. 1301.

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## CHAPTER IV.

## OF APPEALS IN ORDINARY ACTIONS IN SHERIFF COURT.

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| 1. <i>Introductory.</i>                     | 8. <i>Time of Appeal.</i>                        |
| 2. <i>List of Appealable Interlocutors.</i> | 9. <i>Engrossing the Appeal.</i>                 |
| 3. <i>Interim Decree for Money.</i>         | 10. <i>Procedure in Appeal.</i>                  |
| 4. <i>Sisting an Action.</i>                | 11. <i>Effect of Appeal.</i>                     |
| 5. <i>Interlocutors as to Proof.</i>        | 12. <i>Expenses of Appeal.</i>                   |
| 6. <i>Appeals by Leave.</i>                 | 13. <i>Regulating Possession Pending Appeal.</i> |
| 7. <i>Final Judgments.</i>                  |  |

1. **Introductory.**—The right of appeal from Sheriff-Substitute to principal Sheriff did not exist at common law. The Sheriff-Substitute, being the deputy of the Sheriff, acted in his name, and the decision was in law the decision of the Sheriff.<sup>(a)</sup> The right of appeal was of gradual introduction. It is a comparatively recent matter the holding of an interlocutor to be final before the giving out of the “extract” or official copy to the parties; and the practice of petitioning the judge to reconsider his decision (reclaiming) until he prohibited further petitions of the kind, was universal.<sup>(b)</sup> When the Sheriff was in the sherifffdom at the time of presenting, he disposed of those petitions; and when he was not in the sherifffdom it became

(a) Erskine, i. 2, 14.

(b) Erskine, iv. 3, 5. In 1709 the Court of Session made an order limiting the number of reclaiming petitions against interlocutors pronounced “in presence” to two. Down to 1853, it remained competent to reclaim once to

the Sheriff-Substitute against most of his interlocutors. In some of the counties the number was not reduced to this till 1825. In Kincardineshire the number remained without limit of any kind till 1817.

frequent to ask the Sheriff-Substitute to take the opinion of the Sheriff before disposing of them. With such requests the Sheriff-Substitute of former days naturally complied, as he held office at the Sheriff's pleasure. The next step was directly to crave the Sheriff's opinion; and on this the Sheriff-Substitute pronounced an interlocutor allowing the appeal. The last stage prior to the introduction of the present forms was the system embodied in the Act of Sederunt of 1825, and continued by that of 1839, in which the obtaining of special leave to appeal in each case was changed to a general right to appeal, subject to a power in the Sheriff-Substitute to "refuse to allow" the appeal where, in his opinion, the interlocutor ought to be carried into immediate effect.(c)

As matters stood under the Act of 1839, parties had the power of appealing in all proceedings conducted under it against any judgment of the Sheriff-Substitute, whether interlocutory or final, by which they might think themselves aggrieved.(d)

By the Act of 1853, the power of appealing was so far limited as to make it incompetent, before the pronouncing of an interlocutor disposing (in whole or in part) of the merits of the cause, to appeal against any interlocutor which did not dispose of a dilatory defence, sist process, allow a proof,(e) or decide upon the admissibility of evidence.(f) Matters stood in this position till the passing of the Act of 1876, which now regulates the right of appeal.(g)

(c) A. S., 10th July, 1839, § 98. This system had been at work under the old local regulations for varying periods before 1825, but not for a long time. The Kincardineshire regulations of 1804 deal only with reclaiming petitions, and know nothing of appeals, though they

were informally in use before that.

(d) A. S., 10th July, 1839, § 98; A. S., 12th Nov. 1825, chapters 13 and 14.

(e) 16 & 17 Vict. c. 80, § 19.

(f) *Ibid.* § 17.

(g) 39 & 40 Vict. c. 70, §§ 27-34.

**2. List of Appealable Interlocutors.**—The Act of 1876, enumerates the appeals which may be taken, and further declares that none except those named shall be competent. The appeals competent are of two classes. In any ordinary action, they may be taken either against interlocutory judgments, or against the final judgment. The following is a list of the judgments against which, according to the statute, an appeal may be taken :—

- (1.) Interlocutor, granting or refusing interdict, interim or final ;
- (2.) Interlocutor, granting interim decree for money, or making an order *ad factum præstandum*, or sisting an action ;
- (3.) Interlocutor, allowing or refusing, or limiting the mode of proof ;
- (4.) Interlocutor, against which the Sheriff-substitute, either *ex proprio motu* or on the motion of a party, grants leave to appeal ; and
- (5.) Interlocutor containing final judgment.<sup>(h)</sup>

Of the interlocutors above named, those relating to interim interdict, and to orders *ad factum præstandum*, have no concern with actions which simply contain money conclusions, and they will therefore be considered afterwards in connection with the special actions to which they belong. The remainder will be taken here in their order.

**3. Interim Decree for Money.**—This cannot give rise to much difficulty in the ordinary case of a decree to pay part of the

<sup>(h)</sup> *Ibid.* § 27. The provision making this list exhaustive is important, as some Sheriffs used to hold that there was an appeal from substitute to principal, whenever it was not expressly prohibited.

money concluded for in the petition. An interim award of expenses, however, has been held in the Court of Session, not to be an interim decree for money to the effect of making an appeal competent,<sup>(i)</sup> and there could hardly be room for interpreting the words differently in the Sheriff Court. The only course apparently, which the party aggrieved can take, is to pay in the mean time, and to trust to getting repetition if the interlocutor be afterwards recalled. An order to consign money probably would not be held an interim decree, to the effect of authorising immediate appeal. A party who was in a position to obey, would have to comply in the meantime, and a party who was unable to obey, would have to allow decree by default to pass for non-consignation, and then appeal. But an order for the uplifting of consigned money, and the paying of it to the opposite party, is clearly equivalent to an interim decree and is therefore appealable.<sup>(j)</sup>

**4. Sisting an Action.**—When an interlocutor sisting an action has been pronounced, either party may appeal, and it is hardly possible that any difficulty can arise as to when this step is competent.

**5. Interlocutors as to Proof.**—Any interlocutor (1) allowing a proof, or (2) refusing one, or (3) limiting the mode of proof, is subject to appeal. When a proof has been allowed, it is the principal interlocutor allowing it which is subject to appeal, and not (if the two be separate) the interlocutor fixing the diet for proof, or assigning a new diet where something has prevented the proof being taken on the day originally assigned.<sup>(k)</sup> If, however, the allowance of proof itself should

(i) *Notman v. Kidd*, 9th Feb. 1872, 1874, 2 R. 25.

9 S. L. R. 292.

(k) *Murphy v. M'Keand*, 15th Feb.

(j) *Baird v. Glendinning*, 16th Oct. 1866, 4 M. 444.

have lapsed, and it be necessary to allow proof of new, the new order is subject to appeal.<sup>(1)</sup> Interlocutors adjourning a proof from day to day, or still less refusing so to adjourn, are not appealable. Interlocutors refusing a proof are seldom pronounced in so many words, but the sustaining of a plea to the relevancy of some fact which is not admitted, would be equivalent to one and should therefore be subject to appeal. Interlocutors limiting the mode of proof, are those where a proof at large is refused and one by writ or oath is granted, or the like. They would not include a ruling as to the admissibility of evidence made during the course of the proof. The clause in the Act of 1876, dealing with appeals must be read in connection with the clause of the same Act (§ 23) which directs when proof is to be allowed, if proof is considered necessary. It was not intended by the Act that every incidental order which might be pronounced in the course of a process, should be made the occasion for interrupting its progress by an appeal. What was intended was to give one opportunity, namely after the debate on the record, of settling what should be done about proof, and, then, one opportunity of appeal on that point. If, however, anything were done at any other stage which fell distinctly under the category of an allowance, refusal, or limitation of proof, an appeal would be competent. In the case of granting or refusing a diligence for the recovery of writings before a record is closed there might be difficulty. The granting of such a thing is virtually a granting of proof, and there might be great hardship if appeal were not competent. On the other hand, it would be absurd if a process were liable to be stopped because the Sheriff-Substitute had refused such a motion. Against an order for proof *in retentis*, there is virtually no

(1) *Kinnes v. Fleming*, 15th Jan. 1881, 8 R. 386.



appeal, because though one were taken, the Sheriff-Substitute could allow it under his power to see (notwithstanding it) to the preservation of evidence.(m)

**6. Appeals by Leave.**—All inconvenience, however, which might be caused by the incompetency of appealing against interlocutory judgments, should be removed under the power which the Sheriff-Substitute has of allowing an appeal against any interlocutor. This leave may be given *ex proprio motu*, or on the motion of either party.(n) Where this leave is wanted, care should be taken to apply for it immediately, as the Sheriff-Substitute has no power to extend the time in which an interlocutory appeal is competent.(o) The mode of application may be either by minute, or by motion. It must be made to the Sheriff-Substitute who pronounced the interlocutor, and there is no necessity for his hearing any discussion on the point.

**7. Final Judgments.**—A final judgment is defined by the Act of 1876 (§ 3) to be one which “either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced on all the questions of law or fact raised therein, and although expenses, if found due, have not been taxed, modified, or decerned for.” This definition is taken from the Court of Session Act of 1868, where it occurs for the purpose, *inter alia*, of regulating appeals

(m) 39 & 40 Vict. c. 70, § 31. See also A. S., 11th July, 1828, § 5, as to the meaning of “allowing proof,” and the cases on its construction in the

article *infra* on appeals for jury trials.

(n) 39 & 40 Vict. c. 70, § 27.

(o) *Ibid.* § 28.

from the Sheriff Courts.(p) It introduces both new phraseology and new ideas. The old understanding about a final judgment was that it was one which disposed of the whole merits of the cause. The new form substitutes "subject-matter" for "merits," with what object is not clear, as both must end in the practical point of disposing of the whole prayer of the petition, by granting, refusing, or dismissing, as the case may be. The new expression, however, is distinctly wider than the old one on one point, namely, that it includes the question of liability for expenses. It has recently been so construed in the Court of Session for the purpose of settling the competency of appeals from the Sheriff Court.(q) The judgment was founded in part upon technicalities of Court of Session procedure, but it must be taken as fixing the meaning of the word for all purposes. Unless the question of liability expenses therefore be disposed of, a judgment is not a "final" one, and there is no appeal unless one be competent, and taken, as against an interlocutory judgment.

It will be observed that a supplementary interlocutor taxing, modifying, or decerning for expenses does not come within the definition of a final judgment,(r) and as it is not one of the appealable interlocutory judgments there is no opportunity of appealing against it when it is pronounced after the final judgment has become unappealable.

**8. Time of Appeal.**—Against any judgment from which an appeal is competent, an appeal may be taken within seven days from its date.(s) In the case of a final judgment, however, this

(p) 31 & 32 Vict. c. 100, § 53.

(q) *Greenock Parochial Board v. Miller*, 25th May, 1877, 4 R. 787; *Russell v. Allan*, 18th Oct.; and *Malcolm v.*

*M'Intyre*, 19th Oct. 1877, 5 R. 22.

(r) *Tennents v. Romanes*, 22nd June, 1881, 8 R. 824.

(s) 39 & 40 Vict. c. 70, § 28.

period is extended to one month, provided the judgment have not sooner been extracted or implemented.(t) Although all the provisions as to appeals from Sheriff-Substitute to principal Sheriff contemplate that they are to be presented before extract, it seems hard that allowing extract in a shorter period should have the effect of shortening the seven days for appealing which the Act confers in absolute terms. As judgments may always be extracted after fourteen days, an appellant can never rely on having more than that time for appealing.

If the interlocutor is pronounced on one day, but not signed till another, it is from the latter that the appealing days run;(u) and an interlocutor signed out of the sheriffdom bears date on the day when it is received at the seat of the Court to which the process belongs.(v) On the same principle, an interlocutor signed within the sheriffdom at a place different from that where the court in question sits should be held to be dated when received at the latter.

**9. Engrossing the Appeal.**—The party who proposes to appeal must engross and sign under, or on the margin of, the interlocutor appealed against, the words—"The pursuer [*or defender or other party*] appeals to the Sheriff." This note may be signed either by the party or his agent, and it must bear the date of signature. Should the interlocutor sheet not be in the hands of the clerk, the party must lodge a notice of appeal, written in the same terms, merely prefixing the name of the cause and the date of the interlocutor. On this notice the Sheriff-Clerk must certify that the interlocutor sheet is not in his hands. If a party wants to appeal against part only of

(t) 39 &amp; 40 Vict. c. 70, § 33.

11 D. 601; *supra*, p. 188.(u) *Cleland v. Clark*, 15th Feb. 1849,

(v) 39 &amp; 40 Vict. c. 70, § 50.

an interlocutor, there seems no great reason why he should not qualify his appeal accordingly; but the effect will not be more than to show what he wishes: it will not limit the powers of the Sheriff in dealing with the appeal.

**10. Procedure in Appeal.**—The appeal may be disposed of with or without argument, and where there is argument, it may be either written or oral. If the parties concur in asking the principal Sheriff to dispose of the appeal without any argument, he may do so if he thinks fit. This request would necessarily be made by written note lodged along with the appeal or shortly after it, and transmitted to the principal Sheriff by the Sheriff-Clerk. In the case of argument not being dispensed with, the principal Sheriff's discretion settles whether it is to be written or oral. The Sheriff-Clerk transmits the process to him forthwith after the appeal is engrossed, and the principal Sheriff then makes an order, either for reclaiming petition and answers or for an oral hearing. He cannot order both.(x)

If reclaiming petition and answers are ordered, or either of them, the principal Sheriff prescribes the time for lodging, which (under the Act of 1853) may be once (and only once) prorogated for cause shown.(y) The papers must be drawn without any quotation (except what is indispensable) from the interlocutors, notes thereto, proof or process.(z)

If an oral hearing is ordered, the principal Sheriff must fix a diet for it.(a)

**11. Effect of Appeal.**—Under the former practice, the rule was that under an appeal no redress could be given, except,

(x) 39 & 40 Vict. c. 70, § 28.

(z) 39 & 40 Vict. c. 70, § 30.

(y) 16 & 17 Vict. c. 80, § 6.

(a) *Ibid.* § 28.

from the particular interlocutor, or part of an interlocutor, against which it was directed, and that no party could benefit by an appeal except the appellant. Hence appeals, special and general, were in use, and cross appeals were necessary. The Act of 1876 introduced what the English call the system of appeal by a rehearing. This system had been adopted in the Court of Session by the Act of 1868,<sup>(b)</sup> and having been found to work well the clause was adopted *verbatim* in the Sheriff Court.<sup>(c)</sup> The object of the new rules is that the principal Sheriff may "do complete justice without hindrance from the terms of any interlocutor in the cause." Hence:—

(A.) Under the Act of 1876, an appeal opens up not only the particular interlocutor appealed against, but every prior interlocutor in the cause. The words are purposely made wide enough to cover prior interlocutors which could have been appealed against at the time. Thus an appeal against an interlocutor pronounced on the import of proof, opens up the question whether the proof was properly allowed. And an appeal brings up, as a matter of course, all interlocutors which were not appealable at the time, as interlocutors calling or refusing to call new parties, sisting or refusing to sist mandatories, interlocutors on the admissibility of evidence, or the like.

(B.) Counter appeals are unnecessary, and any party may make any motion in the appeal, which is competent in the action. Thus, if a party appeals against a decree awarding damages, the principal Sheriff may, at the instance of the opposite party, increase them. To prevent this rule being defeated, no appeal once taken can be withdrawn, without leave of the Sheriff, and an appeal may be insisted in (*i.e.*, used to bring up the cause for rehearing) by any party in the

(b) 31 & 32 Vict. c. 100, § 69.

(c) 39 & 40 Vict. c. 70, § 29.

cause, other than the appellant, in the same way as if it had been taken by the other party himself.(d)

(c.) Under an appeal, the principal Sheriff may open up the record, if it appears to him not to have been properly made up, and may allow further proof.(e) Under the former practice, when a principal Sheriff opened up the record, he was confined to allowing amendments with the object only of improving it from an artistic point of view.(f) Now, it is presumed he will be entitled and bound to make amendments in the spirit of those required by the section of the Act of 1876 dealing with that matter, that section being applicable equally to Sheriffs principal and substitute. The power to allow further proof is new, and overrules the former practice, which was, not to allow further proof except when it was competent as being additional proof under the Act of Sederunt of 1839.(g)

(D.) If the principal Sheriff make any merely clerical or accidental error in his judgment, he may correct it at any time before extract, or appeal to the Court of Session.(h)

**12. Expenses of Appeal.**—The expenses of the appeal are in the discretion of the principal Sheriff, and the practice is to give them as expenses in the cause to the successful party. They must however be specially dealt with by the Sheriff's judgment, the rule of practice (which for many years regulated this matter) that a simple affirmation of an interlocutor giving expenses, carried the expenses of the appeal ;(i) having been

(d) 39 & 40 Vict. c. 70, § 29; *King v. Gavan*, 26th May, 1880, 17 S. L. R., 583.

(e) 39 & 40 Vict. c. 70, § 28 (3).

(f) *Gibson v. Smith*, 29th Jan. 1870, 8 M. 445.

(g) *Mabon v. Cairns*, 29th Oct. 1875, 3 R. 47.

(h) 39 & 40 Vict. c. 70, § 34.

(i) *Gordon v. Walker*, 5th March, 1872, 10 M. 520, and 9 S. L. R. 339.

altered so as to make the practice correspond with the practice in similar matters in the Court of Session.(j)

**13. Regulating Possession pending Appeal.**—The power to regulate possession pending an appeal has been restored to the Sheriff-Substitute by the Act of 1876. The Court of Session had held, so far back as 1837, that during an appeal to the principal Sheriff the Sheriff-Substitute could do nothing. This holding was not only questionable as matter of law, but was inconvenient in practice. It is now declared (Act of 1876, § 31) that the Sheriff-Substitute—"having a just regard to the interests of the parties as they may be affected by the decision on the appeal"—shall have power to regulate all matters relating to interim possession according to his discretion. Thus (it is declared that) he may make any order for the preservation of any property to which the action relates, or for the sale of such property when perishable, or for the preservation of evidence. An interim interdict, though appealed against, is binding till recalled, and an appeal does not prevent the immediate execution of a warrant of sequestration for rent, or of a warrant to take inventories or place effects in custody *ad interim*, or other warrants of interim preservation. These are all salutary provisions, and they do not prevent the principal Sheriff from regulating the interim possession himself, should he have the opportunity, and see fit—the statute expressly reserving and confirming his power.(k)

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(j) *Macdonald v. M'Eachan*, 18th Feb. 1880, 7 R. 574, 17 S. L. R. 392. (k) 39 & 40 Vict. c. 70, § 31.

## CHAPTER V.

## OF THE EXTRACT OF THE DECREE, AND OF EXECUTION IN THE ORDINARY ACTION.

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## EXTRACT.

1. **Nature of Extract.**—The “Extract” is the official copy of the decree on which the successful party proceeds to exe-



cution against the unsuccessful party. At one time it was customary for it to contain a narrative of nearly all the proceedings in the action, but now it is confined within more reasonable limits, setting forth the parties and the sum decerned to be due, giving the nature of the debt, and concluding with a warrant for execution. The form of the body of the extract is regulated by an Act of Sederunt passed in 1830,(a) and the form of the warrant by the Personal Diligence Act(b) and an Act of Sederunt passed in 1881.(c)

Extracts for execution are issued only to the parties in right of the judgment, but "any party interested, if he shall see cause, may demand a full extract, or an authenticated copy by the clerk, of all or any part of the proceedings," on payment of the prescribed fees.(d) Extracts of this kind are frequently obtained by parties who require to use the proceedings as evidence in other courts.

**2. Competency of Extract.**—All final judgments may be extracted. Though nothing should be found due by them, they may be extracted simply for the purpose of bringing the action to its proper ending. In order to fix what decrees are extractable, the technical word "decern" must always be used in some part of an extractable interlocutor.(e) If the decree be an interim one, it cannot be extracted without special leave from the judge.(f) Where the interlocutor, though final otherwise, had not decerned for the expenses, the successful

(a) A. S., 27th Jan. 1830, Alexander's Acts of Sederunt (first series), p. 390.

(b) 1 & 2 Vict. c. 114, § 9.

(c) A. S., 8th Jan. 1881.

(d) A. S., 27th Jan. 1830, *ut supra*.

(e) *Anderson v. Moon*, 1st June, 1836, 14 S. 863. 39 & 40 Vict. c. 70, § 32 does not affect this point.

(f) *Taylor v. Jarvis*, 20th March, 1860, 22 D. 1081; and see *supra*, p. 297, note (e).

party was formerly held by extracting to have waived his claim to them ;(g) but since the Act of 1876, there is some room for doubting whether this is any longer the case. At all events, in an action where the final judgment on the merits had been first extracted (without any special leave), and the successful party then proceeded to have his expenses taxed, and to have decree for them pronounced and extracted, the Court of Session, while holding that the decree for expenses was not subject to appeal, gave no hint that it was in any way objectionable. No objection to it, however, was stated, and from the position of both parties, it appears to have been the interest of neither to attack (in the appeal) the validity of the decree for expenses.(h) Until the matter is more distinctly decided, it cannot, therefore, be assumed that a successful party can extract the final judgment on the merits to the effect of taking the action out of Court so as to prevent an appeal, and yet so as to leave it in Court to the effect of getting his expenses taxed and decerned for. The proper course is for such a party to ask leave to extract the judgment on the merits *ad interim*, which prevents any room for misconception.

Extract cannot be issued unless all the material parts of the process required to authorise it are in the hands of the Clerk of Court, to remain and show on what grounds and warrants the extract are founded. What is a material part of the process in this sense will depend on circumstances. The petition, as showing the parties and the conclusions dealt

(g) This was done by minute, which (unless the successful party had done something to mislead his opponent into believing that he was to go on in the usual manner) need not have been

intimated to the unsuccessful party ;  
*M'Lachlan v. Campbell*, 28th Feb. 1846,  
8 D. 574.

(h) *Tennents v. Romanes*, 22nd June,  
1881, 8 R. 824.

with, is a part of the process which is always essential. If the original petition be lost there could formerly be no extract, unless with the consent of the opposite party. When a petition was lost the only remedy was to have a proving of the tenor<sup>(i)</sup>; but under the Act of 1876 a copy, proved and authenticated to the satisfaction of the Sheriff, may be substituted. In the same way the want of any other essential pleading could be supplied.<sup>(j)</sup> This Act, however, does not apply to the loss of the original interlocutor sheets<sup>(k)</sup>; and it may be doubted whether the loss could be made up by proving their tenor. Probably there are no parts of the process other than petition and interlocutor sheets which are in every case necessary.<sup>(l)</sup> But it is easy to conceive cases where the loss of some other step would be material—for instance, where the final judgment sustained a particular plea, and the pleading necessary to show what it was had gone amissing.

**3. Time of Extract.**—Until the passing of the Court of Session Act of 1868, the time for issuing extract was regulated by the Act of Sederunt of 1839. Under it the time for extracting was six free days after final judgment, provided that, if the taxation of the expenses was contained in a separate interlocutor, forty-eight hours had elapsed from its date without appeal being taken,<sup>(m)</sup> and that no intention to appeal to the Court of Session had been intimated. The Sheriff had also power to allow extract to be issued at an earlier date, or to supersede it till a later period. Where an intention to appeal

(i) *Mair v. Inglis*, 18th Jan. 1862, 24 D. 312; *Forsyth v. Aird*, 13th Dec. 1853, 16 D. 205.

(j) 39 & 40 Vict. c. 70, § 11.

(k) *Cofton*, 13th March, 1875, 2 R. 599. Of consent and in special circumstances a copy has been substituted in

a Court of Session case, *Douglas*, 7th Feb. 1883, 20 S. L. R. 579.

(l) *White v. Arthur*, 23th June, 1865, 3 M. 1025.

(m) A. S., 10th July, 1839, §§ 113 and 114. *Williamson v. M'Lachlan*, 19th July, 1866, 4 M. 1091.

to the Court of Session was intimated, the Clerk could not issue the extract till fifteen days after the judgment. The Court of Session Act of 1868, in dealing with appeals,<sup>(n)</sup> extended the time for extract to twenty days, and allowed it in all appealable cases, whether intention to appeal was intimated or not; and it took away the power of granting immediate extract. The result thus was, that there were two times for issuing extract, one (of twenty days) for causes in which appeal to the Court of Session was competent, and another (of six days) for those in which it was not; and that the power of allowing immediate extract, or extract before the normal time, was competent only in those causes which could not be appealed to the Court of Session. This state of matters was confusing and inconvenient, but it is necessary to refer to it, in order that the amendments made by the Act of 1876, may be understood.

The Act of 1876, in dealing with decrees *in foro*, in the first place, shortens the period of extract to fourteen days, in all cases; in the second place, declares that in no case shall the period of extract be, without special leave, less than fourteen days; and in the third place, restores the power of shortening the time of extract by special leave.<sup>(o)</sup> The period of extracting a decree in absence is seven days, and here there seems no power of shortening.<sup>(p)</sup> Under the old forms the period for extracting always counted from the date of the final judgment, and when it became extractable it was requisite to count only forty-eight hours from the supplementary decree which taxed the expenses before extracting both together.<sup>(q)</sup> But now it would seem that the normal period for a decree for expenses is just the same as that for any other decree. The

(n) 31 & 32 Vict. c. 100, § 68.

(o) 39 & 40 Vict. c. 70, § 32.

(p) *Ibid.* § 14, *vide supra*, p. 331.

(q) *Cruickshank v. Smart*, 5th Feb. 1870, 8 M. 512.

inconvenience of this may be remedied by the Sheriff allowing the decree taxing expenses to be extracted along with the one on the merits, adding always (to prevent surprises) the proviso that the former shall not be extracted in less than forty-eight hours from its pronouncing. To avoid any doubt about extracting a decree pronounced for failure to lodge defences after appearance entered, it is well to let the time always be at least seven days, and except by special leave not less than fourteen.

The power of superseding extract is one analogous to that of sisting a process. It is rarely exercised, and only in cases where the debtor is entitled to reasonable time for some purpose before being called on to pay.<sup>(r)</sup> Its competency seems not to be affected by the provisions of the Act of 1876, which reduce the time for extract to fourteen days, because the supercession of extract is virtually a condition made by the judgment and forms part of the decree on the merits.

The powers of shortening or lengthening the period for extract are always exercised by an instruction embodied in the decree; and as the propriety of exercising them depends always on the merits of the cause, it would not be safe to pronounce such an order at an after period, because after the merits were settled it would be irregular to re-open a discussion on them.

In any question as to the time at which an extract was issued, it will always be presumed that it was not issued prematurely but it will be open to the person against whom execution is being done to state the objection without its being necessary for him to bring a reduction of the extract.<sup>(s)</sup>

<sup>(r)</sup> Thomson v. Duncan, 10th July, 1844, 17 Jurist, 53; Grindlay v. Saunders, 5th March, 1830, 8 S. 642.

<sup>(s)</sup> Badger v. Blantyre, 16th Nov.

**4. Form of Extract.**—The extract must conform to the judgment and prior proceedings by which it professes to be authorised.(t) The form of extract contained (in so far as the first part of it is concerned) in the Act of Sederunt of 27th January, 1830, and (in so far as the warrant annexed is concerned) in the Personal Diligence Act (as modified by the Act of Sederunt of 8th January, 1881), is to be followed as nearly as may be, but trifling deviations will not affect the validity. Thus, though the statute contemplates that in the warrant the debtor is again to be mentioned by name, and that the sum is to be repeated specifically, a warrant referring to them as previously shown in the earlier part of the extract is not fatally irregular.(u) It is enough if the dates of the judgments ordering payment of the principal sum and expenses in the first instance be given, without giving the dates of judgments affirming them on appeal.(v) If the dates of the latter only were given, the extract would appear equally good.

The form of the extract being still mainly regulated by an Act of Sederunt passed over fifty years ago, is not easily adapted to the present practice. The body of the extract must still state the nature of the debt or claim for which the sum decerned for is due. So long as these particulars had to be given (as was formerly the case) in the conclusions of the action, the Clerk had not much difficulty in stating them, but now that they have to be gathered from the condescendence, it

(t) Stair, iv. 1, 45, and iv. 42, 10; Ersk. iv. 2, 6; Dickson on Evidence, § 1258.

(u) *Hanna v. Neilson*, 2nd March, 1849, 11 D. 941.

(v) *Thomson v. M'Donnell*, 6th July, 1841, 3 D. 1167; *Williamson v.*

*M'Lachlan*, 19th July, 1866, 4 M. 1091. If the decree have a date at the beginning and a date of signing, the latter is the date to be given; *Cleland v. Clark*, 15th Feb. 1849, 11 D. 601; 27th July, 1850, 7 Bell's Ap. Ca. 153.

is often not easy ; and, where the pursuer has made several claims, and a slump sum has been awarded, it may be almost impossible. However, the Clerk issuing the extract must remember that specification is required, and that the nature of the debt decerned for must be described, and do his best to comply with the requirement. The provision of the Act of Sederunt of 1830 is that "the bond, bill, or other document or claim founded on [in respect of which the sum decerned for has been found due] must be shortly mentioned by date or otherwise."<sup>(w)</sup>

The extract is not issued under seal, but is authenticated by the signature of the Clerk of Court,<sup>(x)</sup> on each page, and by a docquet at the end (also signed by him), in which the number of pages of the extract and any alterations or marginal additions are mentioned.<sup>(y)</sup> The place and date of extracting are generally mentioned in the docquet, but it has been decided that (though advisable) they are unnecessary.<sup>(z)</sup> Erasures in an essential part of the extract would be fatal to it, and ought never to be permitted in any part, as a party doing diligence on such a document might subject himself in claims for damages.

<sup>(w)</sup> Sellar's Forms, vol. i. p. 387.

<sup>(x)</sup> M'Dougall v. Ardchattan, 10th Jan. 1623, M. 12,180. In this case an extract signed by the judge was rejected.

<sup>(y)</sup> Dickson on Evidence, § 1254. It is essential that each sheet have at least one signature.

<sup>(z)</sup> Williamson v. M'Laohlan, *ut supra*; Wilson v. Wilson, 25th Nov. 1848, 11 D. 160. The opinion given in Mr. Dickson's work on Evidence (1252), that an extract of a decree not concluding with a warrant for

execution in terms of the Personal Diligence Act requires to be authenticated in the old form prescribed by the A. S., 6th March, 1829, does not seem well founded, because that form was superseded by the A. S., 27th Jan. 1830, in which the form is the same as in the Personal Diligence Act. The point, however, is of no importance, as it is not possible to conceive any circumstances in which the authentication of a decree which contains no authority for a warrant can be of much consequence.

**5. Warrant embodied in Extract.**—The warrant for execution, which was formerly a separate writ, is now embodied in the extract of the decree. Its form as contained in the Personal Diligence Act,(a) authorised messengers-at-arms and officers of court (1) to charge the debtor to make payment within a specified time under pain of poinding and imprisonment, and also (2) to arrest the debtor's readiest goods, debts, and sums of money, in satisfaction of the debt. The form as thus provided remains unchanged, except in one particular. Imprisonment for civil debt being now in general incompetent,(b) the warrant in the ordinary case contains no mention of that penalty. In certain excepted cases, imprisonment for debt is still competent, and in these cases the extract should still empower the debtor to be charged under pain of it.(c) The excepted cases are (1) Taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed; (2) Sums decerned for aliment; and (3) Decrees *ad facta præstanda*. The enforcement of ordinary decrees by imprisonment, having thus disappeared, nothing will be said about that pain or penalty until the first of the special subjects for which it may still be inflicted is reached,—which according to the arrangement of this book, happens to be the one last named. In the case of sums decerned for aliment, the form of imprisonment for debt differs very materially from that in use in the other cases.(d)

In regard to the warrant to charge care must be taken that the time given to the debtor to make payment be the proper period. The time, called the days of charge, is seven days,

(a) 1 & 2 Vict. c. 114, Sch. No. 6.

(b) 43 & 44 Vict. c. 34, § 4.

(c) A. S., 8th Jan. 1881.

(d) 45 & 46 Vict. c. 42, §§ 3 and 4.



unless there be any special authority in law for inserting a shorter period.(e) There is no ground for believing that the Sheriff has any discretionary power of shortening or extending the days of charge.

The warrant itself authorises only the remedies of pointing and arrestment. If the creditor wants payment out of arrested funds, he has a further application to make to the Court.

**6. Second Extract.**—A party may have as many extracts of the decree as he chooses to pay for; and in this way, when a first extract has been lost, or has defects, he can always have a remedy. This is the only way of getting over a faulty extract in the Sheriff Court, for there is no power of amending extracts, such as the Court of Session can exercise.(f)

**7. Expense of Extract.**—The expense of extract had formerly to be dealt with as a separate matter, but decree for expenses in general terms is now held to include the expenses of extract, and the clerk adds them without further authority from the Court.(g)

#### EXECUTION.

**8. Different kinds of Execution.**—The nature of the execution varies according to what is desired to be taken in payment. The debtor's property may be either real or personal; and the personal property, again, may consist

(e) 39 & 40 Vict. c. 70, § 8.

dence, § 1260.

(f) See *Edington v. Astley*, 5th Dec. 1829, 8 S. 192; *Dickson on Evi-*

(g) 16 & 17 Vict. c. 80, § 14.

either of moveable goods in the debtor's hands, or of goods or debts due to him by others. The mode of attaching real property in payment of a moveable debt was by an apprising, but since 1672 this diligence has been incompetent, and adjudications (which in practice are confined to the Court of Session) have been substituted.<sup>(h)</sup> The other kinds of execution are competent in the Sheriff Court. The debtor's goods may be poulded and sold; and by the diligence called arrestment and furthcoming the goods or money due to him may be secured to his creditors. To diligence against the goods in his hands a charge is a necessary preliminary, and it will therefore be noticed first; and then the two kinds of execution competent will be taken in their order. There is no rule, however, requiring a creditor to do diligence in a particular sequence. He may begin with the diligence he pleases, and may use both at the same time if he be so inclined.

**9. By whom Execution carried out.**—The execution is carried out by a messenger-at-arms,<sup>(i)</sup> or by a sheriff-officer who is selected and employed by the creditor or his agent. The sheriff-officer can act only within the jurisdiction for which his commission is granted. Should the officer neglect or contravene his duty so as to defeat the effect of the diligence, he and his cautioner will become liable for the debt.<sup>(j)</sup>

(h) 1672, c. 19. In certain cases of debts *already heritable* there is a kind of execution competent in the Sheriff Courts called *poulding of the ground*, which will be noticed in Part III. Chap. II.

(i) 1 & 2 Vict. c. 114, Sch. No. 6.

(j) Gilchrist v. Sutherland, 19th July, 1776, M. voce "Messenger," Appx. 1; Chatto v. Marshall, 17th Jan. 1811, F. C.; Couper v. Bain, 12th Nov. 1868, 7 M. 102.

**10. Execution beyond the County.**—The warrant attached to the extract is available only within the jurisdiction of the court from which it was issued. If it be desired to charge, poind, or arrest, within the territory of another Sheriff, a warrant of concurrence must be craved; and it must be indorsed upon the extract, either by the Clerk of the Bill Chamber of the Court of Session, or by the Clerk of the Sheriff within whose jurisdiction the debtor, or his moveables, or the arrestee may be.<sup>(k)</sup>

#### CHARGE.

**11. The Charge.**—The charge is the technical name for the formal requisition to pay, which, after judgment has been extracted, is embodied in the proper document and given to the debtor, at the instance of the creditor. It is given by the messenger-at-arms or officer of court, and is in the shape of a command, in the name of the Sovereign and of the Sheriff of the county, or of the latter alone, ordering the debtor to pay the debt, interest, and expenses set forth in the judgment.

**12. At whose Instance.**—The charge is given at the instance of the creditor named in the decree, but if he have assigned his interest, his assignee can get authority to charge. The assignee must indorse on the extract a minute (signed by himself or his agent) craving authority to charge, arrest, and do other diligence at his own instance. This he must present to the Clerk of the Court from which the extract was issued, along with the evidence of the mode in which he acquired right to the extract; and the clerk, if there be no lawful cause to the contrary, must give the requisite authority, by writing after the minute the words "*Fiat ut petitur*," and dating and

(k) 1 & 2 Vict. c. 114, § 13; Sch. 10.

subscribing them. He indorses the same date on the documents produced, and initials it.(*l*) If the right to the extract have been conveyed in any other way than by an ordinary assignation—for example, by confirmation, to the executors; by marriage, to the husband; or by bankruptcy, to the trustee—the mode of getting authority to do diligence is the same.

A person not resident in Scotland does not require to conjoin a mandatary with himself in doing diligence, though if the diligence be suspended he might require to sist a mandatary in the suspension.(*m*)

**13. Requirements of the Charge.**—The principal requirement of the charge is, that it be exactly in conformity with the extract-decree under which it is given.(*n*) This decree must be correctly referred to by the names of the pursuers and defenders, and its date.(*o*) The date on which the extract was issued need not be given, though it generally is.(*p*)

The document charges the debtor (designing him by name) to pay to the creditor (also designing him by name) the sums contained in the decree.

If anything have been paid to account care must be taken to give credit for it.(*q*)

The time allowed for payment is that specified in the warrant contained in the extract, and in the ordinary case is seven days.(*r*) In order that it may appear when the time will expire, the date of the charge is essential.(*o*)

(*l*) 1 & 2 Vict. c. 114, § 12.

(*m*) *Ross v. Shaw*, 8th March, 1849, 11 D. 984; *Chambers v. Chambers*, 8th June, 1839, 1 D. 911. But see *supra*, p. 230.

(*n*) *Craig v. Brook*, 23rd Nov. 1841, 4 D. 54; *Watts v. Barbour*, 1st July, 1828, 6 S. 1048.

(*o*) *Beattie v. McLellan*, 28th May, 1844, 6 D. 1088. An error (in an

execution of arrestment) of 13th for 30th in giving the date, was held fatal; *Graham v. Bell*, 15th July, 1875, 2 R. 972.

(*p*) See *supra*, art. 4.

(*q*) See *M'Martin v. Forbes*, 12th Nov. 1824, 3 S. 275.

(*r*) 39 & 40 Vict. c. 70, § 8; *supra*, p. 337.

The charge is written, or partly written and partly printed, and is authenticated by the signature of the officer.(s)

**14. Service of the Charge.**—The charge may be served by the officer as soon as the extract is issued. It is served on the debtor or debtors mentioned in the decree, the only exception being that, in the case of a company debt, the individual partners may be charged, although the names of none of them have been contained in the decree.(t) The place and mode of service, and the regulations as to the presence of a witness, are exactly the same as in the case of a service of the petition, except that a charge could not be served through the Post-Office.(u) If there have been any irregularity either in the charge itself or in the mode of service, the way to cure it is for the creditor to abandon the charge by letter, and to give a new charge.(v)

**15. Execution of the Charge.**—After serving the charge the officer fills up a certificate of his having done so, which is called the Execution of the Charge. The form for this document is given in the Personal Diligence Act. It is signed by the officer and the witness.(w)

The execution of the charge is an echo of its words, with the addition of describing the time and mode of the service,(x) and as it is the foundation for going on to the use of further

(s) 1 & 2 Vict. c. 114, § 32.

(t) *Knox v. Martin*, 12th Nov. 1847, 10 D. 50. A creditor charging in this way a person who is not a partner is liable in damages.

(u) 1540, c. 75; *ante*, Chap. II., sec. II.

(v) *Clark v. Hamilton*, 27th Nov. 1875, 3 R. 166.

(w) 1681, c. 5; 1 & 2 Vict. c. 114, § 32, Sch. 2.

(x) 1540, c. 75; *Nisbet*, 30th July, 1736; *Elchies*, *voce* "Execution," No. 2.

diligence, as much care should be taken with it as with the charge itself.(y)

**16. Registration of the Execution.**—The execution may be registered in the Court from which the extract issued. This may be done upon presenting the extract and execution to the clerk, at any time at which the holder of the decree may apply, not later than a year and a day from the expiry of the charge. Its effect is to accumulate the debt and past interest into a capital sum, whereon interest shall thereafter become due.(z)

#### POINDING AND SALE.

**17. Nature of Poinding.**—Poinding is the means by which the goods of a debtor who has been charged to pay, and has failed to do so, are made available for payment of the debt. Formerly the goods themselves were adjudged to the creditor.(a) A value was placed on them, at which they were indeed tendered back to the debtor; but, as a person who had not money to pay his debts seldom had money to buy back his goods, the result generally was that the goods went to the creditor at the appraised value in payment of his debt. Under the modern practice, if the debtor cannot take back the goods at the appraised value, they are offered for sale by public auction, and are not handed bodily to the creditor unless there be no one at the sale willing to give the appraised value for them.(b)

(y) Diligence, however, is not necessarily vitiated by a clerical error in the execution; *Henderson v. Rollo*, 18th Nov. 1871, 10 M. 104.

(z) 1 & 2 Vict. c. 114, § 10.

(a) See former practice, explained in *Erskine*, iii. 6, 20.

(b) Personal Diligence Act, 1 & 2 Vict. c. 114.

18. **What may be Pounded.**—All the goods of the debtor found in his own possession, or in the possession of his servants or others who hold solely as custodiers for his behoof, or in public places, may be pounded. It is, however, only *goods* that can be pounded. Pounding is not the diligence for attaching debts due to the debtor; and within this category it seems that bills and bank-notes, and even coin, must be counted.(c) It seems indeed to be clear (from the whole procedure which is followed) that pouncing cannot be the diligence to reach such things, and as negotiable debts have been exempted from arrestment, the remarkable result is reached that it is hardly possible to attach them at all.(d) If the debtor will not part with them, he must be proceeded against under the Bankruptcy or Cessio Acts, when the Sheriff will have power to grant warrant for them being taken possession of and placed in safe custody, and if necessary for this purpose to open lockfast places and to search the dwelling-house and person of the debtor.(e)

There are certain exceptions in regard to the goods that may be pounded. Thus ships, for some reason, are attached by arrestment.(f) Plough goods, that is, implements for tilling the ground, and the horses or oxen used for drawing them, cannot be pounded during the season for tillage, unless other goods cannot be found.(g) Goods in which the debtor has only a joint interest,(h) or a temporary interest, such as a

(c) See *Alexander v. M'Lay*, 10th Feb. 1828, 4 S. 439, where the point as to the competency of pouncing negotiable documents was raised. In the Exchequer Act (19 & 20 Vict. c. 56, § 32) there is special power to pounce for Crown debts "the whole moveable effects, without exception, including bank-notes, money, bonds, bills, crop, stocking, and implements of husbandry

of all kinds."

(d) See *infra*, art. 30.

(e) 43 & 44 Vict. c. 34, § 12.

(f) See Arrestment and sale of Ships, *infra*, art. 37.

(g) 1503, c. 98, Erskine, iii. 6, 22; *Lord Advocate v. Forgan*, 20th Feb. 1811, F. C. (Appx. No. 1).

(h) *Fleming v. Twaddle*, 2nd Dec. 1828, 7 S. 92.

liferent,(i) cannot be poinded; but to prevent fraudulent claims of this kind goods found in the debtor's possession are presumed to be his until the contrary is proved. Goods subject to a hypothec cannot be poinded where the person having the right of hypothec objects, unless security be given for the whole of the debt secured by the hypothec.(j) Where the period for payment of this debt is past, sufficient security will be given if effects enough be left to meet it.(k) If the poinding creditor pays or finds security for the secured debt, he is entitled to an assignation of the right of hypothec,(l) but it is illegal for him to poind (as has been done) greatly more than his own debt, in order to pay out of the proceeds both it and the secured debt.(m)

It is sometimes difficult to tell whether an article is moveable or not. Thus, it is held that growing corn is moveable if it be nearly ripe;(n) but that it is not moveable if it has only brairded.(o) Grass and green crops, which a tenant is bound to consume on the land, probably could not be poinded.

**19. Time of Poinding.**—The full days of the charge must have expired before the poinding can be executed. How long the creditor may delay after the charge is not settled; but poindings have been sustained which were not executed for three or four years after the charge was given.(p) The limit

(i) *Scott v. Price*, 13th May, 1837, 15 S. 916.

(j) *Pringle v. Scot*, 30th June, 1736, M. 6216; *Jack v. M'Caig*, 16th Jan. 1880, 7 R. 465.

(k) *Hay v. Keith*, 25th July, 1623, M. 6188.

(l) *Crawford v. Stewart*, 21st Jan. 1737, M. 10,531.

(m) *M'Kinnon v. Hamilton*, 21st June, 1866, 4 M. 852; *Hamilton v. Emslie*, 27th Nov. 1868, 7 M. 173.

(n) *Ballantine v. Watson*, 15th June, 1709, M. 10,526.

(o) *Elder v. Allen*, 5th July, 1833, 11 S. 902.

(p) *Kerr v. Barbour*, 30th May, 1837, 15 S. 1041.



of a year and a day, for registering the execution (Art. 16) does not affect the power of poinding.

A poinding must be in the day time. At latest, it must be begun before sunset, and executed during daylight.(g)

**20. How Poinding Executed.**—The poinding is executed at the place where the goods are found ; and if the officer cannot get access to them he may open shut and lockfast places in all cases in which the extract-decree authorises him to do so. This authority is contained in all extracts of ordinary Sheriff Court decrees.(r) At the debtor's dwelling or premises the officer reads his warrant and asks payment of the debt.(s) If any one offers payment, either then or at any stage before the poinding is complete, the poinding must be stopped, and if the officer has not special authority to receive it, the money must be taken to the creditor, or consigned in some bank. The officer has not authority to receive the money without special instructions ; and if he were to receive and lose it, the debtor might have it to pay over again. What has to be tendered is merely the sum or sums contained in the extract-decree, not the expense of charging and attending to poind. When the latter are not tendered, the creditor must bring another action for them. The person paying is not entitled to have delivery of the extract, but he is entitled to see such a marking made on it as will prevent it being used for further diligence.(t)

Where no tender is made, the officer proceeds to inventory the goods, and have them valued. This is done by two valuers, whom he appoints by administering an oath for

(g) *Douglas v. Jackson*, 11th Feb. 1895, M. 3739. ordinary use.

(r) 1 & 2 Vict. c. 114, Sch. 6.

(t) *Inglis v. M'Intyre*, 14th Feb. 1862, 24 D. 541.

(s) See the form of execution in

the due performance of their duty. The valuation must be specific, each article, or set of articles, being kept separate.(u) A pointing was once found bad because a trunk and its contents had been valued at a lump sum.(v) Goods are pointed to the amount of the debts contained in the decree and of the expenses of the diligence. The invariable practice is to include the latter, because if there is a sale those expenses can be taxed in due course, and there is nothing in this case to be gained by leaving over their settlement to a future action. The legality of the practice seems settled.(w)

At the conclusion of the pointing, the goods are offered back at the appraised value. If any one then tender the value of the goods, the creditor must take it, even though the amount be less than his debt; if the goods be bought back they cannot be pointed again for the same debt.(x)

If there be no payment, the officer then leaves a schedule of the pointed goods with the person in whose possession they were pointed; and with him the goods also remain.(y) The officer usually warns the parties present of the consequences of meddling with any of the goods.

**21. Person interrupting Pointing.**—If any person claim any of the goods as his, the officer may examine him or his witnesses on oath; and if he be satisfied that the goods claimed are not the debtor's, he may discontinue the pointing. If the person claiming the goods produce a written title to

(u) *Le Conte v. Douglas*, 1st Dec. 1880, 8 R. 175. Here the valutors were not put on oath, and a quantity of miscellaneous articles were valued in one head at the amount of the debt.

(v) *M'Knight v. Green*, 27th Jan.

1835, 13 S. 342.

(w) *M'Neil v. M'Murphy*, 13th Feb. 1841, 3 D. 554.

(x) *Fiddes v. Fyfe*, 16th Feb. 1791, Bell's 8vo Cases, 355.

(y) 1 & 2 Vict. c. 114, § 24.

them, it is said that the officer (though not satisfied with it) must desist from the poinding, and make a special report on the point.<sup>(z)</sup> Any person interrupting the poinding by a claim of this kind is liable in damages if the claim be ill-founded ;<sup>(a)</sup> and the person who interrupts a poinding by force is liable to punishment, and to make payment of the value of the goods.<sup>(b)</sup> The proper way to prevent a sale under an illegal poinding is for the debtor either to lodge objections in the poinding, or to apply for interdict. If any person is aggrieved by having his goods poinded for the debts of another, he also can have his remedy at once in one of these ways, and he will further be entitled to payment of all damages he may have sustained.<sup>(c)</sup>

**22. Conjoining Creditors.**—To prevent expense in unnecessary competitions between creditors, it is provided that, where an officer proceeds to poind at the instance of any creditor, he shall conjoin in the poinding any other creditor who shall exhibit and deliver to him a warrant to poind. The claim to be conjoined must be made before the first poinding is completed. When such a claim is made, the officer poinds enough to meet both debts. He causes the poinded effects to be valued as in the ordinary case, and one valuation is sufficient.<sup>(d)</sup> If the poinding has been com-

(z) Menzies (Lectures, 3rd ed., p. 308), founding on *Breadalbane v. Sinclair*, 22nd July, 1687, M. 10,522 ; but the case cannot be taken as conclusive.

(a) *Arnot v. Dowie*, 20th Nov. 1863, 2 M. 119. No liability for the debt, as such, is incurred.

(b) *Erskine*, iii, 6, 27.

(c) It is sometimes thought that the

only remedy is by interdict, and this may be true if warrant of sale have been granted, but prior to this an objection in the poinding seems competent. A similar proceeding has been decided to be competent in sequestrations ; *Lindsay v. Wemyss*, 18th May, 1872, 10 M. 708.

(d) 1 & 2 Vict. c. 114, § 23.

pleted before the second creditor has had the opportunity of being conjoined, he must (if he desires to share in the proceeds) take steps to have the debtor sequestered or made notour bankrupt under the Bankruptcy Acts.(e)

**23. Reporting the Poin ding.**—The officer must report an execution of the poin ding to the Sheriff. This he must do within eight days, unless cause can be shown for requiring a longer period.(f) The execution must specify the diligence under which the poin ding was executed, the amount of the debt, the names and designations of the debtor and of the poin ding creditor, the effects poin ded and their value, the names and designations of the valutors and of the person in whose hand the goods were left, and the fact of the delivery of the schedule to him. The execution is subscribed by the officer and the two valutors, who (it is provided) shall be the witnesses to the poin ding.

**24. Custody of Goods between Poin ding and Sale.**—On the execution being reported to the Sheriff, it is competent for him to give such orders for the security of the moveables as he may find necessary. Under this power he may give orders for their removal from the custody of the debtor, if there is reason to fear that they will not be safe with him. In former times it was the practice to remove the goods at once in every case. If the articles are of a perishable nature, the Sheriff is empowered to provide for their immediate disposal, under such precautions as he may think fit.(g)

Any person unlawfully intromitting with or carrying off the poin ded goods is liable to be imprisoned until he restore them

(e) 19 & 20 Vict. c. 79, §§ 7 and 12.

v. Stewart, 17th Feb. 1835, 13 S. 483.

(f) 1 & 2 Vict. c. 114, § 25; Miller

(g) 1 & 2 Vict. c. 114, § 26.

or pay double the appraised value. This power may be exercised on a summary complaint being made, either to the Sheriff of the county where the effects were poinded, or to that of the domicile (residence) of the person who interfered with them.(A)

**25. Fixing and Advertising the Sale.**—When required, the Sheriff grants a warrant for the sale of the poinded effects. The requisition is usually made by the poinding officer when reporting the poinding. The warrant is always granted, unless lawful cause be shown to the contrary.(i) It fixes what notice of the sale is to be given, and the time and place at which it is to be held. It also names a judge of the roup at whose sight the sale is to be carried out. The notice is left to the discretion of the Sheriff, and will vary greatly, according to the nature and value of the articles to be sold; but the Sheriff will naturally see that it is of the same character as would be given by a prudent person having a similar sale for his own behoof. The time of the sale must not be sooner than eight days, nor later than twenty days, after the notice.(j) As an unsuitable hour might have as bad an effect on the sale as an unsuitable day, the hour as well as the day should be fixed in the warrant.(k) The place of sale has also to be fixed by the Sheriff;(l) and it is in his discretion to fix this so as to suit all parties in the best way possible. These things the Sheriff must himself fix, and he must not grant a general warrant to sell within a

(A) 1 & 2 Vict. c. 114, § 30.

(i) A debtor desirous of stopping the proceedings at this stage must suspend. An arrestment of the poinded articles in the debtor's hands is of no avail. *Ferguson v. Bothwell*, 3rd March, 1832, 9 R. 687.

(j) A sale advertised on the 10th is

competently carried out on the 18th; *M'Neil v. M'Murphy*, *supra*, note (w).

(k) See the point raised in *M'Kinnon v. Hamilton*, 21st June, 1866, 4 M. 852.

(l) *M'Vicar v. Kerr*, 2nd July, 1857, 19 D. 948.

specified period, leaving the notice or the time or place to be filled in by the officer.(m) The Sheriff orders a copy of the warrant of sale to be served on the debtor and on the person who has possession of the pointed effects, if he be different from the debtor, at least six days before the date of the sale.(n)

**26. Conduct of the Sale.**—At the sale the goods are offered at upset prices not less than the appraised values. If the appraised value be offered they must be sold, and the pointer or any other creditor is at liberty to buy.(o) If no offerer appears, the effects, or such part as may be necessary (according to the appraised value) to satisfy the debt, interest and expenses, due to the pointing creditor or creditors, is delivered over to them or their authorised agent. The Act declares that, notwithstanding this delivery, the goods shall remain subject to the claims of other creditors to be ranked as by law competent;(p) but as the goods, when thus delivered, pass from the custody of the Court, the right to such ranking, where the bankruptcy laws give it, will have to be made good in separate proceedings.

**27. Report of Sale.**—Within eight days after the day of sale the judge of the roup must report to the Sheriff what has taken place.(q) If the goods have been delivered, he reports that fact; but if the goods, or any of them, have been sold, he lodges (also within eight days) the roup rolls or certified copies of them, with the Sheriff-Clerk, together with

(m) *Kewly v. Andrew*, 8th March, 1843, 5 D. 860.

(n) 1 & 2 Vict. c. 114, § 26. (There is an exception for perishable effects.) This warrant, like all those connected with the carrying out of diligence, would

not fall within those which could be served postally.

(o) 1 & 2 Vict. c. 114, § 29.

(p) 1 & 2 Vict. c. 114, § 27.

(q) 1 & 2 Vict. c. 114, § 28; *Miller v. Stewart*, 17th Feb. 1835, 13 S. 483.

an account setting forth the sum arising from the sale and the expenses which attended it. The sum the Sheriff may order to be lodged in the hands of the Sheriff-Clerk if he see cause; and this power is useful where other creditors have made claims to be ranked along with the poinding creditors, because while the money remains in the hands of the Court the Sheriff may decide between the competitors, and apportion the money amongst them according to their several rights, without putting them to the expense of new proceedings.<sup>(r)</sup> If consignation is not ordered, or if after consignation is made no cause be shown to the contrary, the Sheriff orders payment of the sum to the poinding creditor or creditors, or of so much of it as is necessary to meet his or their debts and expenses. The creditors receiving the money take it subject to the right of other creditors to share with them under the Bankruptcy Acts;<sup>(s)</sup> but that right, after the money is paid over, will have to be made good under new proceedings.

**28. Register of Poindings.**—The Sheriff-Clerk keeps a register of all poindings, and is bound to show the report of any poinding, with the relative documents, to all concerned on payment of a fee of one shilling.<sup>(t)</sup>

#### ARRESTMENT AND FURTHCOMING.

**29. Arrestment in Execution.**—Arrestment in execution is a diligence similar to arrestment in security, and, when completed by decrees in the action of furthcoming, to which it is preliminary, has the same effect as the diligence of poinding

<sup>(r)</sup> In competitions of this kind the proceedings are the same as in multiple-poindings.

<sup>(s)</sup> 1 & 2 Vict. c. 114, § 28.

<sup>(t)</sup> *Ibid.*

in transferring the property of the debtor to the creditor.(u) But until thus completed by this decree, the transfer is imperfect, and the diligence is liable to be defeated. In competitions between arrestments, none of which have been followed by decree of furthcoming, they rank with each other according to their date, but when in this incomplete state they cannot compete with a poinding,(v) or a sequestration under the bankruptcy statutes, or with a confirmation as executor-creditor,(w) or with any other transfer complete in itself.

**30. What may be Arrested.**—The general principle, in regard to what may be arrested, is, that all debts or goods owing to the debtor may be arrested in the hands of the persons who are to pay or supply them to him.

With regard to debts due to the debtor, there is seldom much difficulty in understanding when they may be arrested, as almost any kind of debt, not being heritable,(x) which is due to him is arrestable. Thus the price of goods sold may be arrested in the hands of the buyer;(y) money lodged in bank may be arrested in the hands of the bank;(z) the debtor's share of a company's stock may be arrested in the hands of the company;(a) the debtor's interest in a life policy in the

(u) *Muirhead v. Cowie*, 17th Feb. 1785, M. 687.

(v) 2 Bell's Com., 5th ed., 64.

(w) *Wilson v. Fleming*, 26th June, 1823, 2 S. 430.

(x) Although heritable debts recorded in the Register of Sasines are now moveable *quoad* succession (31 & 32 Vict. c. 101, § 117), they are still heritable on this point. Heritable debts not recorded may be arrested; 1661, c. 51; *Stewart v. Dundas*, 20th

Feb. 1706, M. 705. The interest of an heritable debt, or the price of heritage sold, is arrestable.

(y) *Creditors of Bonjedward*, 24th Nov. 1753, M. 743.

(z) See *supra*, p. 218, note (i).

(a) *Sinclair v. Staples*, 27th Jan. 1860, 22 D. 600. In the incorporating acts and charters of some companies there are special provisions against the arrestment of stock.



hands of the insurers;(b) or a ward's funds in the hands of his factor.(c) But there are certain debts which cannot be arrested. Thus, money which has been consigned and set apart for a certain purpose cannot be arrested so as to defeat that purpose.(d) Alimentary funds are in like manner exempt from arrestment,(e) and under this exemption are included wages of all kinds, in so far as they do not exceed twenty shillings per week.(f) In order not to interfere with their use as currency, debts due by bill of exchange have been exempted from arrestment.(g)

With regard to goods to which the debtor has right, there is often great difficulty in saying when they are liable to arrestment, and when they should be attached by poinding. If the arrestee possess them simply for the debtor, and have no right of any kind to retain them as against him, arrestment is not the proper diligence.(h) But if the arrestee have them in such a capacity, as to give him a right of retention, it seems that in general they may be arrested in his hands. Thus, while an arrestment in the hands of a clerk, of goods belonging to his employer is bad,(i) an

(b) *Bankhardt's Trs. v. Scottish Amicable Life Assurance Society*, 21st Jan. 1871, 9 M. 443. The payment of a new premium does not necessitate a new arrestment.

(c) *Mitchell v. Scott*, 29th June, 1881, 8 R. 875.

(d) *Ante*, p. 198, art. 10 (Consignation).

(e) *Smith v. Bell*, 29th May, 1855, 17 D. 778.

(f) 33 & 34 Vict. c. 63. The surplus is arrestable, and the exemption does not apply to decrees for alimentary debts, rates, or taxes, or to debts incurred before the Act.

(g) *Dick v. Goodall*, 1st June, 1815,

F. C. It is said that the creditor wanting to attach the contents of a bill held by his debtor, should raise an action of exhibition, or a sequestration of the bill, against his debtor, so as to prevent him negotiating it. See the last edition of Thomson on Bills, p. 194. The use of an interdict to aid an arrestment was held objectionable in *M'Cubbin v. Venning*, 3rd Dec. 1859, 22 D. 164, but the circumstances were peculiar.

(h) *Erskine*, iii. 6, 5.

(i) *Burns v. Bruce*, 27th Feb. 1799, Hume 29; and see a similar case, *Cunningham v. Home*, 18th Nov. 1760, M. 747.

arrestment of goods in the hands of a carrier or of a manufacturer seems to be good.(j) But this principle is not strictly carried out; and where the custody is of a short or temporary character there is no power of arrestment in the hands of the custodier. Thus, a parcel could not be arrested in the hands of a street porter, and a horse cannot be arrested in the hands of a smith who is shoeing it,(k) or in the hands of an innkeeper in whose house the owner is staying;(l) although each of these parties has a certain right of retention.(m) Where there is no right of retention at all, there can be no arrestment; for instance, where a tenant hires a furnished house the furniture cannot be arrested in his hands.(n) Where there is a clear right of retention, on the other hand, there is a clear right to arrest; for instance, in the case of goods sold but not delivered, creditors of the purchaser may arrest them in the seller's hands.(o)

Where the custodier of the goods is not bound to give up the goods themselves to the debtor, but has got them for the purpose of selling them and accounting to him for their proceeds, they may be arrested in his hands. As he then has the power of disposing of them, the goods are, properly speaking, in his hands, and out of the hands of the debtor. Thus, when

(j) *Matthew v. Fawns*, 21st May, 1842, 4 D. 1242, 2 Bell's Com. (p. 70 of 7th ed.); *North British Railway Co. v. White*, 4th Nov. 1881, 9 R. 97.

(k) *Neilson v. Smith*, 20th Feb. 1821, Hume, 31.

(l) *Hume v. Baillie*, 29th May, 1852 14 D. 821.

(m) The question whether articles coming into the hands of procurators fiscal and other officers of justice in the course of proceedings can be arrested,

is open, though the practice is common; *Stuart v. Cowan*, 8th Feb. 1883, 10 R. 581; 20 S. L. R. 374.

(n) *Davidson v. Murray*, 11th Dec. 1784, M. 761.

(o) See 19 & 20 Vict. c. 60, § 3. The seller, to put himself on a par with other creditors, may also arrest; and this is the only case in which a party can arrest goods in his own possession.

a debtor went abroad leaving behind the furniture in his house, with instructions to an agent to sell it, an arrestment used in the agent's hands was held good.(p)

**31. On whom Arrestment served.**—The arrestment must be served on the debtor to the arrester's debtor.(q) The arrestee must be indebted directly to the debtor, and not to some intermediate party.(r) Where the debtor has a claim against some person, who again has a claim against some second person (say some trustee), arrestment in the hands of this second person is invalid.(s) This does not mean that the arrestee must always be the person who incurred the debt due to the debtor; it is enough that he be such a person as the debtor could have maintained an action against for his debt. For example, the arrestee may be the trustee under the bankruptcy statute,(t) or a general factor and commissioner,(u) or the executor,(v) or other legal administrator, of the person indebted to the debtor.

The arrestee must further be indebted to the debtor at the actual time when the arrestment is used; and the arrestment

(p) *Brown v. Blaikie*, 26th Nov. 1850, 13 D. 149; and (to similar effect) *Macfarlane v. Forrester*, 20th Nov. 1823, 2 S. 505; and see also *Todd v. Smith*, 16th July, 1851, 13 D. 1371.

(q) The arrester's debtor, or the debtor in the decree, is usually called in the books the "common debtor," because in a competition between arresting creditors he is indebted in common to all of them. But the name is unnecessary and confusing when speaking of cases where there is no competition. It would be a great convenience if, instead of always having to repeat "debts due to the debtor,"

some such words as "credits" were in use.

(r) See also *supra*, Ch. III. s. II. art. 3 (p. 218). An arrestment served on an individual partner for a company debt was held invalid; *Hay v. Dufourcet*, 19th June, 1880, 7 R. 972.

(s) *Campbell v. Faikney*, 12th Dec. 1752, M. 742.

(t) *Grierson v. Ramsay*, 25th Feb. 1780, M. 759.

(u) *Erskine*, iii. 6, 4; 2 Bell's Com. (7th ed., p. 71).

(v) *Globe Insurance Co. v. Mackenzie*, 5th Aug. 1850, 7 Bell's Ap. Ca. 296.

will not affect any debt or property for which his liability commences at some subsequent time. Thus, if goods be consigned to a person, an arrestment laid on before their actual arrival is bad; because until the arrival the consignee is under no obligation to account for them.<sup>(v)</sup> In like manner, though an arrestee be in process of making up a title (such as that of executor), in which capacity the debtor would have a claim against him, yet, if the title be incomplete at the date when the arrestment is used, the arrestment is ineffectual.<sup>(x)</sup> On this principle, an arrestment of rents or interests covers only arrears and the rent or interest for the current term.<sup>(y)</sup>

The persons in whose hands the arrestments are used must be carefully designed. An arrestment used in the hands of "Sibbald Brothers," where the name of the company was "Sibbald Brothers & Co.," was held bad.<sup>(z)</sup>

### 32. How Arrestment Used.—Giving a charge to the

(v) *Stalker v. Aiton*, 9th Feb. 1759, M. 745.

(x) *Atkinson v. Learmonth*, 14th Jan. 1808; M. voce "Service and Confirmation," Appx. No. 3.

(y) *Livingston v. Kinloch*, 10th March, 1795, M. 769; *Smith v. Burns*, 23rd June, 1847, 9 D. 1344; *Wright v. Cunningham*, 23rd June, 1802, M. 15,919.

(z) *Henderson's Trustees v. Lang*, 20th May, 1831, 9 S. 618. It is difficult, looking at arrestment in execution as a means of recovering debts that are due, to understand why so many confusing distinctions have been introduced, but they have arisen from the diligence having been so often used to obtain inequitable preferences by one creditor over another. The whole

law stands greatly in need of revision.

It is not right that a creditor seeing goods belonging to his debtor should be liable to have his right to them defeated, and himself perhaps found liable in damages, because the law leaves him in uncertainty as to the technical mode of attaching them. This is all the more unjust because the uncertainty often arises from the unavoidable want of knowledge of the relations subsisting between the debtor and the person in whose hands the property is seen. The length of time which a person who has used arrestments in execution may delay in following them up is preposterous, and permits an almost fraudulent appearance of having credit to be kept up long after the reality is gone.

debtor is not necessary prior to arrestment.(a) The arrestee is served with a schedule which narrates the extract-decree under which the arrestment is used, and if this service be not personally given, the officer must send through the post a copy of the schedule to the last known place of abode of the arrestee.(b) The schedule then arrests (in the form in which it is commonly used) a specified sum (not exceeding the debt) and all goods, gear, and effects belonging to the debtor, which are in the hands of the arrestee. Sometimes also the schedule specifies the particular debt which the arrestee is due to the debtor, or the particular article belonging to the debtor which the arrestee has in his hands; and this is a prudent course to take where there is any suspicion that the arrestee may not be unwilling to misunderstand the arrestment.

An execution of arrestment is made out by the officer.

**33. Effect of Arrestment.**—The effect of arrestment is to make an arrestee paying to the debtor in defiance of it liable in second payment to the arrester; and liable also, it may be, in an arbitrary fine for disregarding proceedings taken under the authority of a court. In the same way as in the case of arrestment in security, the arrestee is not liable in repayment, or (still less) in the penalty, if he have paid the debt while excusably ignorant of the arrestment having been used.(c) If the arrestee die, the arrestment should be used over again against his representatives as, though the arrestment is still good for the purpose of competition, they are held not to be bound to know of it.(d)

(a) *Weir v. Falconer*, 2nd Feb. 1814, F. C.

(b) 39 & 40 Vict. c. 70, § 12 (5).  
The execution states the fact. An arrestment (being diligence) could not

be served postally under the Citation Amendment Act of 1882.

(c) *Ante*, p. 220, art. 7.

(d) *Aberdeen v. Scot's Creditors*, 22nd Dec. 1738, M. 774 and 775.

**34. Recalling or Restricting Arrestments.**—A debtor may petition to have an arrestment recalled or restricted, with or without caution as may seem just, and although this proceeding is chiefly used in the case of arrestment in security, the language of the statute authorising it is broad, and there seems no sufficient reason why it should not be used also in the case of an arrestment in execution.<sup>(e)</sup> It is not a remedy available for trying whether the funds belong to the arrestee,<sup>(f)</sup> his course seeming to be—if he be wrongly inconvenienced by the arrestment and no furthcoming be brought—to raise a multiplepinding.

**35. Prescription of Arrestment.**—An arrestment in execution (like an arrestment in security) prescribes in ordinary Sheriff-Court proceedings in three years from its date; and unless the usual action of furthcoming or some other action, such as a multiplepinding, be brought before the expiry of this period to have the debt or goods adjudged to the arrester, the arrestment falls.<sup>(g)</sup>

**36. Action of Furthcoming.**—The action of furthcoming is brought at the instance of the creditor, and calls the arrestee and the common debtor as defenders. It may be brought in the Sheriff Court to whose jurisdiction the arrestee is subject, although the common debtor be not subject to it.<sup>(h)</sup> The action concludes for payment to the creditor of the debt due by the arrestee to the debtor, or of so much

<sup>(e)</sup> 1 & 2 Vict. c. 114, § 21; *Journal of Jurisprudence*, vol. xxi. p. 682.

<sup>(f)</sup> *Vincent v. Chalmers' Tr.*, 2nd Nov. 1877, 5 R. 43.

<sup>(g)</sup> 1 & 2 Vict. c. 114, § 22.

<sup>(h)</sup> 39 & 40 Vict. c. 70, § 47; § 12 (1), and § 8. The warrant for service out of the jurisdiction need not be indorsed, and an officer of the issuing sheriffdom may serve. Edictal citation would seem competent;

of it as will pay the creditor's debt and the expenses of the arrestment. If goods have been arrested, the summons may conclude for a warrant to sell them and to apply their proceeds in like manner. It is one of the anomalies of the law of arrestments that the expenses of a furthcoming cannot be made good out of the arrested effects.(i)

In defence, the arrestee is limited to pleading defences against the validity of the arrestment. He cannot dispute the debt due by the common debtor to the arrester;(j) but if he deny his own liability to the debtor there may be a litigation about it of the same kind as if he were being directly sued for it. When the furthcoming is defended a record is made up, and, if necessary, proof allowed, in the same way as in an ordinary action. In modern practice the rule which Erskine stated, that the arrestee's oath was conclusive in this action as to the amount due by him to the arrester's debtor, is not followed.

**37. Arrestment of Ships.**—As already mentioned, arrestment is the proper diligence for attaching a ship. Even while on the stocks, unfinished, a ship can be taken only in this way.(k) The ordinary warrant to arrest, contained in the extract, is sufficient,(l) but there is also a special form of

*Ibid.* § 9; and there can be no doubt that the action can be served postally. Formerly the action had to be brought in a court to the jurisdiction of which both arrestee and common debtor were subject; *Wightman v. Wilson*, 9th March, 1858, 20 D. 779. In the Small-Debt and Debt-Recovery Courts, it has always been (by special enactments) enough if the arrestee were subject to the jurisdiction, and now this is enough in the ordinary court also.

(i) *May v. Malcolm*, 7th June, 1825, 4 S. 76. The case was one of arrestment in security, but the principle (whatever it may be) seems equally applicable to arrestment in execution.

(j) *Houston v. Aberdeen Town and County Bank*, 20th July, 1849, 11 D. 1490.

(k) *Mill v. Hoar*, 18th Dec. 1812, F. C.

(l) *Clark v. Loos*, 17th June, 1853, 15 D. 750.

precept for a maritime arrestment. The arrestment is served by the officer going to the ship along with a witness, and affixing the schedule to the main-mast, or (if there be no main-mast) to the stern post, and chalking over it the letters "V. R." If there be any fear of the ship being removed, the officer is at liberty, if it be in harbour, (m) to dismantle it; but if he does this he must take care to have proper assistance, for if he damage the ship, or allow it to be damaged by dismantling, he will be held responsible. (n)

A ship may be arrested in this way even for the debt of a part owner. (o)

The arrestment is completed by bringing an action of sale against the owners of the ship, under which action the ship is sold by public roup, and the proceeds applied in payment of the debt. (p)

#### EXECUTION IN ENGLAND AND IRELAND.

**38. On what Decrees.**—By the Inferior Courts Judgments Extension Act, 1882, some decrees obtained in the Sheriff Courts obtain a certain amount of effect in parts of the United Kingdom other than Scotland. Formerly decrees pronounced in the Scottish Sheriff Courts were of no more avail in England or Ireland than in Russia. The only way of enforcing them was to bring in the sister country another action, in the course of which they would be treated with a little respect, as raising a sort of *prima facie* case in favour of the plaintiff. This procedure by way of action is still left competent, but if resort

(m) *Petersen v. M'Lean*, 14th Jan. 1868, 6 M. 218.

(n) *Kennedy v. M'Kinnon*, 13th Dec. 1821, 1 S. 198 (O. E. 210).

(o) *M'Aulay v. Gault*, 6th March, 1821, F. C.

(p) *Campbell on Citation and Diligence*, p. 158; "Bell's Law Dictionary," by Watson, *voce* Ship, and "Neill's Forms of Proceedings in Maritime Causes," pp. 59 and 86.



be made to it, now, in cases where a sufficient remedy might be obtained under the Judgment Extension Act, the costs would not be allowed.<sup>(g)</sup> The remedy by registration is unfortunately not yet complete, but the transition has begun, and before very long the divisions between the three countries will present no barriers to the recovery of just debts. In the meantime, the remedy seems hampered by inconveniences and positive defects. The chief defect is, that the diligence on a registered judgment is authorised against "goods or chattels" only,—thus excluding the use of attachment or arrestment of debts; and the chief inconvenience is the necessity for commencing proceedings anew for every different district of the sister country. From the way the Act and relative rules have been framed, the defects and inconveniences will be felt less in the enforcing of Scottish decrees in England or Ireland, than in the enforcing of English and Irish decrees in Scotland.

The Scottish decree must be for debts, damages, or costs, and it may have been pronounced in the Ordinary, the Small-Debt, or the Debt-Recovery Courts.<sup>(r)</sup> The provision that the decree may be for debts, damages, or costs,<sup>(s)</sup> seems wide enough to include every kind of decree for the payment of money,—excepting decrees for the payment of fines—and it seems to include both final and interim decrees. The decree must not, however, have been pronounced against any person who was domiciled in England or Ireland at the time of the commencement of the action, unless—(1) the whole cause of action arose, or the obligation to which the judgment relates, ought to have been fulfilled within the district of the Sheriff Court; and (2), the petition or summons was served upon the defender personally within such district.<sup>(t)</sup>

(g) 45 & 46 Vict. c. 31, § 8.

(s) *Ibid.* § 3.

(r) *Ibid.* § 2.

(t) *Ibid.* § 10. If any Sheriff Court

The time for appealing must have elapsed, or if an appeal, having (as Scottish appeals usually have) the effect of staying execution, has been taken, such appeal must have been disposed of.<sup>(u)</sup> As the word appeal is general, it would include appeals to the Court of Session as well as those from Sheriff-substitute to principal Sheriff. Where the judgment is not by law open to appeal, the provision as to allowing the time for one to elapse cannot apply. The decree should also be extracted. In the case of an interim decree this seems essential, because otherwise there is no means of being certain that the interlocutor may not be recalled when the final judgment comes to be reviewed. With the case of a final judgment, the mere expiry of certain periods without appeals being taken, makes them in certain cases no longer appealable; but as the general law of Scotland understands that a judgment on which diligence can be done means an extracted decree, it would not be advisable for a Sheriff-Clerk to grant a certificate upon an unextracted decree.

After a year from the date of the judgment, no certificate could be granted, because after that none would be available for registration.<sup>(v)</sup>

**39. Certificate of Judgment.**—The decree, being of the kind described in the preceding article, the person holding it may apply to the Sheriff-Clerk for a certificate in the form provided by the Act. Before the Clerk can grant this certificate, there must be proof that the judgment has not been satisfied. The English County Court Rules provide that in

decree to which the Act does not apply is sought to be enforced by registration, a prohibition or injunction may be obtained from one of the Superior Courts

in England or Ireland.

(u) *Ibid.* § 3.

(v) *Ibid.* § 4.

England a registrar may if necessary ask an affidavit to this effect, but neither the Statute nor the Scottish Rules say anything on the point. The proof will therefore have to be to the satisfaction of the Sheriff-Clerk. Assuming him to be satisfied, he will next issue the certificate. This must give the name, business or occupation, and address of the person obtaining the judgment, and of the person against whom it is given. All of these things will usually be found in the process, in one or other of the proceedings. The certificate gives also the date of the judgment, and the amount of money which has to be paid, distinguishing the costs, and stating shortly the nature of the claim. The Sheriff-Clerk then signs the certificate and seals it with the seal of Court.(w) Certain fees are payable to the Sheriff-Clerk and to the law-agent who takes out the certificate,(x) and as these are recoverable from the debtor, it will be proper that the Sheriff-Clerk should, in an indorsement on the certificate, state their amount. In the same way, if the judgment should have to his knowledge been in part satisfied, that should be made to appear. Apparently the Sheriff-Clerk is bound to issue as many successive certificates as may be required, so long as it is proved to him on each occasion that the judgment is not satisfied.

**40. Registration in English or Irish Court.**—In England the certificate (being presented within a year of the date of judgment) will be registered either in the Court of Common Pleas at Westminster, or in the desired County Court, according to the amount decreed for.(y) It must be registered in the County Court, unless this amount be greater than might

(w) *Ibid.* Sch.

(y) 45 &amp; 46 Vict. c. 31, §§ 4 and 9.

(x) A. S., 7th March, 1883, Sch. B.

have been recovered if the action or proceeding had originally been commenced in an English County Court. If it be greater than that it must be registered at Westminster. Here the statute apparently means the amount exclusive of costs. As to when the amount could competently be recovered in an English County Court, the holder will naturally be advised by his solicitor in England, but it may be stated generally that the jurisdiction of the English County Courts extends in the ordinary case of debts or damages to claims not exceeding £50.(z) In Ireland, the certificate must in like manner be presented either in the Court of Common Pleas at Dublin, or in one of the Civil Bills Courts, and it may be mentioned that the jurisdiction of the latter extends to actions arising under contracts, and to actions for debts and damages, to the value of £50.(a)

The certificate may be presented either by the creditor or his solicitor. There must be a written note of presentation,(b) and when presented to the County Court Registrar, there must be appended to it a description of the place within the jurisdiction of the Court, in which the goods and chattels of the debtor are. The Registrar then takes possession of the certificate, seals and retains it, inserting it in a minute book. A copy of the certificate and note, prepared by the creditor, is then sealed and dated, and returned to him.(c) Upon the certificate being registered, the Registrar of the County Court issues to the High Bailiff of the Court a warrant of execution in the usual form used.(d) It empowers the bailiff

(z) Heywood's County Court Practice (2nd ed.) p. 13.

(a) 40 & 41 Vict. c. 56, § 50.

(b) 45 & 46 Vict. c. 31, Sch.

(c) English County Court Rules, 1883, Order xli. The cost of registration is

provided for, and its amount is to be indorsed on the certificate.

(d) *Ibid.* Form 315. Apparently nothing analogous to our charge is required.

to seize the goods and chattels of the debtor, and also his money, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money,—all, to the extent needed to satisfy the execution. This may be followed by the usual steps for converting the seized effects to the use of the creditor. If the proceedings are taken at Westminster the effect will be similarly limited to seizing goods and chattels and documents of debt; and in Ireland, also, nothing more can be seized than the like effects of the debtor. The proceedings in the Irish Civil Bills Courts are identical with those in the English County Courts, the Clerk of the Peace coming in place of the Registrar.<sup>(e)</sup>

**41. Control over Execution.**—The English and Irish Courts have the same control and jurisdiction over the execution of any Scottish registered judgment, as they have over the execution of any judgment in their own courts. If it be proved that the Scottish judgment has been set aside or satisfied, the registration may be cancelled by order of the Registering Court.<sup>(f)</sup>

#### ENGLISH OR IRISH JUDGMENTS IN SCOTLAND.

**42. Judgment and Certificate.**—The Inferior Courts of England and Ireland, whose judgments may be registered in the Sheriff Courts of Scotland, are all of the courts in those parts of the United Kingdom having jurisdiction to hear and determine civil causes, other than the High Courts of Justice. These include, in England, the county Courts, and the city of

<sup>(e)</sup> Irish County Court Rules, 7th June, 1883.      <sup>(f)</sup> 45 & 46 Vict. c. 31, § 6.

London Courts; and in Ireland, the Civil Bills Court, the Courts of Petty Session, and the Bankruptcy Court. The provisions as to the time for appealing having elapsed, and the time for registration are similar to those as to Scottish judgments. The provisions as to the form of the certificate are also the same as those for Scottish judgments.

**43. Registration and Execution.**—At each of the places in Scotland at which an ordinary Sheriff Court is held a register must be kept, and there the creditor or his law-agent must register the judgment.(g) After registration, which is to be done by copying the certificate and note of presentation into the register, these will be returned with a declaration indorsed to the effect that they have been duly registered. The form of this declaration is prescribed by Act of Sederunt, and it will be signed by the Sheriff-Clerk.(h) The registered certificate will now be a sufficient warrant to any officer of the court, to charge the debtor to make payment of the debt and of the costs, inclusive of the costs of obtaining the certificate, and of its registration.(i) How this charge is to be given if (as will generally be the case) the debtor be not within the jurisdiction, is not said, but if he be in another part of Scotland, it might be served in the ordinary way (not postally); and if he be out of Scotland, it might be served edictally,—a registered letter being always, if he be in England or Ireland, sent to his address, as in an edictal citation.(j) If payment be not made within fifteen days, then the creditor may use such further diligence as may

(g) A. S., 7th March, 1883, § 1.

(i) *Ibid.* § 2.

(h) *Ibid.* Sch. A. The fees for registration are fixed in Sch. B.

(j) 39 & 40 Vict. c. 70, § 9.

be competent.(*k*) This unfortunately will be limited to poinding such of the effects of the debtor as he can find within the district of the registering court. Authority to do execution against goods and chattels will not extend in Scotland even to seizing documents of debt or money ;(*l*) and as the districts attached to the local Scottish Courts are small compared to those attached to the English County Courts, the territory within which the warrant will be available will be correspondingly smaller. Apparently, if a debtor possessed four articles, each lying within one of the four districts into which the Sheriffdom of Aberdeen, Kincardine and Banff is divided, the creditor would have to obtain four certificates, procure four registrations, give four charges of payment, and execute four poindings before he could appropriate them. Moreover, he would have to take these sets of proceedings successively and not simultaneously. It is conceivable that means might be devised for taking the effects lying in one sheriffdom with more expedition and with less expense.

The execution is subject to the control and jurisdiction of the Scottish Courts, in the same way as if it were a proceeding under a Scottish judgment; and on proof of recall or satisfaction a registration may be cancelled.(*m*)

(*k*) A. S., 7th March, 1883, § 2. Care 291.  
must be taken to give the *fifteen days'*  
charge, otherwise damages will be due ;  
Smith v. Taylor, 8th Dec. 1882, 10 R.

(*l*) *Supra*, p. 343.

(*m*) 45 & 46 Vict. c. 31, §§ 6 and 7.

**PART III.**  
**OF SPECIAL FORMS OF ACTION.**

—◆—  
**CHAPTER I.**

**OF THE DISTINCTION BETWEEN ORDINARY AND  
SPECIAL ACTIONS, AND ORDINARY AND  
SUMMARY PROCEDURE.**

**ORDINARY AND SPECIAL ACTIONS.**

1. *Distinction between Ordinary and Special Actions.*
2. *First Class of Special Actions.*
3. *Second Class of Special Actions.*

**ORDINARY AND SUMMARY PROCEDURE.**

4. *Distinction between Ordinary and Summary Procedure.*

5. *Cases Requiring Extraordinary Despatch.*

6. *Summary Procedure under the Act of 1853.*

7. *Summary Procedure under Special Statutes.*

THE subjects to be treated of in this part are of so miscellaneous a description that it seems unadvisable to attempt any other arrangement than that of giving, in an introductory chapter, some general explanations as to the various special forms of action and summary modes of procedure, and then in the following chapter to take all the important special actions themselves in alphabetical order.

**ORDINARY AND SPECIAL ACTIONS.**

**1. Distinction between Ordinary and Special Actions.—**Acts of Parliament, and of Sederunt, and the works of the various legal writers, will be searched without much success



for a satisfactory definition of the sufficiently familiar term, "ordinary action;" and after the search it will be easily seen that it is often used with little precision, and with a more or less extensive application. In order to be as precise as possible I have taken throughout as the type of an ordinary action the form which must be used for the recovery of a sum of money exceeding £50, claimed to be due either as debt or as damages. This form of action I treat of, as the ordinary action, and the procedure followed in it, I call the ordinary procedure. All actions which differ in any respect from this form I treat as special actions, explaining under their respective names, as clearly as I can, the points wherein the differences consist. In the chapter following this will be found mention of all of them with the exception of those relating to succession, which, on account of their forming a convenient separate group, I have taken up in a separate part. The special actions to be treated of, in the following chapter, divide themselves sharply into two classes—the one consisting of what might be called "special-ordinary actions," and the other of what used to be called "extraordinary actions."

**2. First Class of Special Actions.**—In the first class of special actions are embraced those which substantially follow the ordinary procedure, but differ only in certain incidental points. These actions agree with the ordinary procedure in the points that when undefended, decree in them passes as a matter of course, and that when defended, they are decided upon closed records and with written proofs. They differ on such minor points, as the competency of proceeding during vacation in the same way as during session, and the necessity it may be of taking some particular step, or steps, in addition to the ordinary steps, or in the power of enforcing them by some

special remedy. As examples of this class may be taken actions *ad facta præstanda*, actions of aliment, petitions for interdict, multiplepoindings, removals and sequestrations for rent. Until 1876 there was a troublesome distinction which had to be kept in view in this class, namely, that some of these special actions,—particularly those which were entitled to proceed during vacation,—began by way of petition, while others of them began by way of summons.<sup>(a)</sup> As the rest of the procedure was substantially identical this difference was meaningless. It was abolished by the Act of 1876,<sup>(b)</sup> and now the procedure in all these actions differs only slightly from the ordinary procedure.

**3. Second Class of Special Actions.**—In the second class of actions the procedure begins to vary with the very first order, and in scarcely any point, after the drawing of the initial writ, does it follow the ordinary course. When unopposed the remedy is, nevertheless, seldom granted as matter of course, but is usually granted only upon proof, or after certain public intimations. When opposed, actions of this class are very often not decided upon closed records, but upon special forms which have been provided for minuting and giving effect to the defence. There is reason to believe that it was not intended to deal with this class of actions in the Act of 1876, except by those sections where they were specially mentioned; but the wording of the definition clause having been left somewhat vague,<sup>(c)</sup> it has been held that the Act applies to them in so far as all events as concerns the form of

(a) This distinction is fully explained in the second edition of this work, pp. 340, 341.

(b) 39 & 40 Vict. c. 70, § 6.

(c) 39 & 40 Vict. c. 70, § 3. Action

is defined as including every civil proceeding in the "Ordinary Sheriff Court." What is meant by the latter expression (which is a popular one) is not defined.

petition ;(d) but it has not been applied further, as to do so would be impossible, and would destroy everything that is valuable in the special forms. Not much has been gained by making the form of petition identical. There is little purpose in having in the petition the embryo of a record, which can seldom or never come to maturity, and little purpose in having the first writ identical with that in an ordinary action, when the divergence of procedure must commence the moment it is presented. However, it is now settled that all special actions, which are of a civil nature, commence with the ordinary petition. Whether this rule applies to actions of a *quasi* criminal nature (as proceedings for breach of interdict, or contempt of court) has not yet been settled.(e) To the second class of special actions belong, proceedings under the Conjugal Rights Acts, applications for the appointments of judicial factors, as to entailed estates, for law-burrows, and for apprehension as *in meditatione fugæ*, and several others.

#### ORDINARY AND SUMMARY PROCEDURE.

**4. Distinction between Ordinary and Summary Procedure.**—The most of the special forms of action are also examples of summary forms of procedure ; but there are some of them which are not summary, and there are cases of summary procedure which are not to be found among them. Thus, actions of multiplepoinding, declarators, and actions of count and reckoning, though special forms, proceed as deliberately

(d) *Crozier v. Macfarlane*, 15th June, 1878, 5 R. 936 ; *M'Dermott v. Ramsay*, 9th Dec. 1876, 4 R. 217.

(e) In the Court of Session these proceedings are taken under a special form called a "petition and complaint."

In practice in the Sheriff Court, the petitions are drawn in the new form, and though several have gone to the Supreme Court on appeal, no objection has been taken to them on that ground.

as ordinary actions; and, again, there are modes of summarily doing certain things which otherwise would proceed in the ordinary way. Thus, for the recovery of certain debts under £50, and of all debts under £12 in amount, the Legislature has provided summary forms of procedure, and these are so important that a separate Part (IV.) will be devoted to them. There are also certain actions which are summary in the sense of being entitled to extraordinary despatch; all actions may be tried summarily if the parties consent; and there are cases where the Legislature has authorised summary procedure without saying more on the subject. Concerning these three categories a few words fall to be said here.

**5. Cases requiring Extraordinary Despatch.**—As the Sheriff has it now in his discretion to pronounce any order in vacation time which he thinks it expedient,(f) the importance of the point whether an action is entitled to extraordinary despatch is not now so great as it once was. It was one which was much discussed under the provisions of the Act of Sederunt of 1839, and there was a good deal of useless and not very creditable litigation in regard to it. Under that Act of Sederunt, the Sheriff had power to proceed, under a summary application, “in all cases which require extraordinary despatch, and where the interest of the party [applicant] might suffer by abiding the ordinary *induciae*.” In such cases it was provided that the procedure should not abide the ordinary course of the Court days, but that it should always be competent to pronounce such interim order as the exigencies of the case required. The Sheriff had power to order the petition to be answered in such short period after service as he thought right; but in all other respects these applications proceeded

(f) 16 & 17 Vict. c. 80, § 44.

in the same way as ordinary actions.(g) These provisions have never been expressly repealed, but their value now is mainly useful as showing the Sheriff when he should give actions precedence, and should not allow them to wait the ordinary Court days. They, together with the clause confirming them on this point in the Act of 1853,(h) are still, however, the only regulations under which actions of interdict and the like may proceed in vacation. They do not otherwise affect procedure; and a doubt is entertained whether under them it is still competent to order answers, in place of a notice of appearance. There are many cases where this is a convenient course, as a guide in showing what interim order is expedient, and the better opinion seems to me to favour its competency.(i) Actions of removing and aliment are entitled, under the same Act of Sederunt of 1839, to the privilege of summary despatch; and in practice many special remedies, such as *meditatione fugæ* warrants, law-burrows, and the like, which did not fall under its provisions, receive extraordinary despatch for the simple reason that without it they would be useless.

**6. Summary Procedure under the Act of 1853.**—A useful form of procedure is provided by the Act of 1853, by which such parties as are willing may have their causes tried summarily. Many actions are tried under this provision every year at little cost, and it forms an excellent device by which parties can, at very little cost, accomplish the end of referring a matter to the decision of the Sheriff. A minute requires to be lodged in the process, setting forth that the parties have agreed to try the cause in the summary way provided by the

(g) A. S., 1839, §§ 137-147.

(h) 16 & 17 Vict. c. 80, § 44.

(i) See Journal of Jurisprudence, vol.

xxv. p. 134.

**Small-Debt Act.** This minute may be lodged in any process which is over the value of £12, and at any stage in it, whether the record has been closed or not. The Statute says that the minute may be signed either by the parties or their procurators, but if the latter sign, it would be prudent for them to have a special mandate from their clients. After this agreement, no further written pleadings are competent, and the proof, if any, is not recorded. There is no appeal from the decision pronounced by the Sheriff, whether Principal or Substitute, except upon such grounds as may competently be pleaded against a small-debt decree. Procurators may appear and plead in these actions, and provisions for their remuneration are made in the Act of Sederunt regulating Court fees.(j)

**7. Summary Procedure under Special Statutes.**—There are some Statutes, such as the Roads and Bridges Act of 1878,(k) the Conveyancing Act of 1874,(l) and the Education Act of 1872,(m) which provide that sums of money due, or disputes arising, under them, may be awarded or determined, as the case may be, by the Sheriff in a "summary manner," and which give little or no indication of what they mean by it. Under these Statutes, difficulties arise as to whether there are to be written pleadings, written proofs, and appeals from Sheriff-Substitute to Sheriff-Principal. Should the particular Statute provide that there is—(1) to be no record of the defence, (2) no record of the evidence, and (3) no review, the Act of 1876(n) provides a means for interpreting the expression, "summary manner;" but as scarcely any Statute of the

(j) 16 & 17 Vict. c. 80, § 23; A. S.,  
4th Dec. 1878, sch. 3.

(k) 41 & 42 Vict. c. 51, § 57.

(l) 37 & 38 Vict. c. 94, § 20.

(m) 35 & 36 Vict. c. 62, § 14.

(n) 39 & 40 Vict. c. 80, § 52.

kind makes all of these provisions, this Act gives little or no help. Where the particular Act simply says that the sum is to be recovered, or dispute settled, in a summary manner, there are four meanings which may be given to the expression. It may mean—(1) that the action is to proceed in the ordinary way, giving it summary despatch; (2) that it is to proceed like a small-debt action, with neither written pleadings nor written proof; (3) that the Sheriff, like an arbiter, may decide what pleadings are requisite, and how the proof should be taken; and (4) that the decision of the presiding Sheriff is to be final. All these conflicting views have found expression among the various Sheriffs. In practice I follow the third view, and on the fourth do not require to give an opinion.(o)

The provisions have not been the subject of direct consideration in the Supreme Court. On the one hand, it is settled that, where a Statute gives a new jurisdiction, and a new form of exercising it, the new forms which are provided must be followed, and no appeal or other step not directed by them must be taken.(p) On the other hand, it has been settled that, where powers which are not of a new kind are conferred, and where (in the Act) it is simply said that proceedings shall be taken in the Sheriff Court, the meaning is that the proceedings shall follow the ordinary course, subject to the ordinary right of appeal.(q) But there are no authoritative decisions to say what summary proceedings in civil matters mean, and, in particular, what review they permit—whether, supposing the review of the Supreme Court has been

(o) The Principal Sheriff of Aberdeen holds that his review is excluded. See Guthrie's Select Cases, pp. 407, 409, and 412.

(p) Balderston v. Richardson, 20th

Feb. 1841, 3 D. 597.

(q) Magistrates of Portobello v. Magistrates of Edinburgh, 9th Nov. 1882, 10 R. 130.

excluded, the view taken by some Principal Sheriffs, that they are nevertheless bound to review the decisions of the Sheriff-Substitutes, is sound; and if it be sound, how it is to be carried out—whether by the whole pleas and evidence being recorded, or by the cause being reheard.

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## CHAPTER II. OF THE VARIOUS SPECIAL ACTIONS.

### SECTIONS.

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### Section I.—ACTIONS *Ad Facta Præstanda*.

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| <p>1. <i>Procedure.</i></p> <p>2. <i>Competency of Remedy.</i></p> <p>3. <i>Enforcement of Decree.</i></p> <p>4. <i>Charge to Perform.</i></p> <p>5. <i>Against whom Imprisonment competent.</i></p> | <p>6. <i>Warrant of Imprisonment.</i></p> <p>7. <i>Apprehending the Defender.</i></p> <p>8. <i>Imprisonment of the Defender.</i></p> <p>9. <i>Alimenting the Defender in Prison.</i></p> <p>10. <i>Liberation of the Defender.</i></p> <p>11. <i>Re-imprisonment.</i></p> |
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1. **Procedure.**—Actions *ad facta præstanda* are, as regards procedure, simply ordinary actions, with such differences as are necessarily involved in the conclusion being one for the per-

formance of some act other than the payment of money. The regulations as to pleadings, evidence, and appeals from Sheriff-Substitute to principal Sheriff are the same as in ordinary actions. If any interim order, however, is wanted, say for safe custody, it is prudent, though it does not seem essential, to include it specially in the prayer; and as the conclusion is not for a money payment, arrestment in security which could only secure money, is an inappropriate and therefore incompetent step.(a) As regards appeals to the Court of Session, there are differences which will be noticed when that subject is reached. If the pecuniary value of the question in dispute can be ascertained from the process, it regulates the scale upon which expenses are to be taxed. If this value cannot be so ascertained, the Sheriff, when deciding the case, must determine the scale.(b)

**2. Competency of Remedy.**—The question of when it was competent to give an order for the specific fulfilment of a contract, in place of merely awarding damages for its breach, was one which till recently had no importance in the law of Scotland. The mode of enforcing the decree was in either case equally stringent, imprisonment being competent for both; and, in fact, there was seldom an action *ad factum præstandum*, which had not an alternative conclusion for damages. Now, however, that imprisonment is still competent for the former alternative,(c) while it is incompetent for the latter, the question has acquired some importance. As the answer to it depends on the law of contract, and not on the law of process, this is hardly the place for discussing it. In the English

(a) *Stafford v. M'Laurin*, 20th Nov. 1875, 3 R. 148.

(b) A. S., 4th Dec. 1878, § 4.

(c) 43 & 44 Vict. c. 34, § 4. In

*Balerno Paper Mill Co. v. M'Kenzie*, 11th July, 1883, 20 S. L. R. 757, an order to consign was held (by a majority) to authorise imprisonment.

equity Courts it has often been discussed, and the view there taken—that it is a matter for the exercise of judicial discretion when to give specific implement,(d) and when to give damages—seems also to be the law of Scotland.(e) The device of asking an insolvent for specific implement, in place of damages, for the simple purpose of acquiring power to imprison him, would, it may safely be predicted, not be countenanced by the Scottish Courts.

**3. Enforcement of Decree.**—In so far as the decree orders payment of expenses, it must be enforced in the ordinary way, by poinding and arrestment ; but, in so far as it is an order *ad factum præstandum*, it can be enforced by the pain of imprisonment, and by it only. This remedy must be used (in the regular way) by extracting the decree and giving a charge upon it. The attempt to proceed in a more summary way is irregular. For example, it is incompetent in the course of the proceedings to grant a summary warrant for the imprisonment of the defender for failure to do the act demanded in the petition.(f)

**4. Charge to Perform.**—The pursuer must cause a charge to be given to the defender to perform the act required by the decree. This is given in every respect in the same way, as the charge to pay, which is required prior to poinding, is given under an ordinary decree.(g)

(d) Addison on Contracts, 7th ed. (by Mr. Justice Cave) ; Book I., Chap. VI., sect. II.

(e) Moore v. Paterson, 16th Dec. 1881, 9 R. 337 ; Grahame v. Magistrates of Kirkcaldy, 26th July, 1882, 9 R. (H. L.), 91 ; Winans v. Mackenzie, 8th

June, 1883, 20 S. L. R. 640.

(f) Murray v. Bisset, 15th May, 1810, F. C. ; Haig v. Buchanan, 20th June, 1823, 2 S. O. E. 412 ; Morrison v. Cuthbert, 16th May, 1835, 13 S. 772.

(g) *Supra*, p. 339.

**5. Against whom Imprisonment competent.**—Certain persons are exempt from imprisonment for civil causes. Peers are exempt; and during the sitting of Parliament, and for forty days before and after, Members of the House of Commons are also exempt.(i) Married women are exempt during coverture,(j) and pupils are exempt under a special statute.(k) Persons who obtained personal protections under the Bankruptcy Act or in the process of *cessio*, were also exempted from imprisonment for civil debt, but this exemption is now practically of no importance. Such imprisonment has practically been abolished, other powers for taking the property of persons in payment of their debts having been provided; and, moreover, those protections did not avail against decrees *ad facta præstanda* which the obligants had the means of obeying.

**6. Warrant of Imprisonment.**—Before diligence against the person can be done, the execution of charge must be registered in the Court of the Sheriff from which the extract was issued, and that within year and day after the expiry of the charge.(l) The clerk who registers it enters the name and designation of the person by whom the extract and execution were presented, and the date of presentation. After registering, the Sheriff-Clerk writes on the extract (and upon the execution if it be separate) a certificate of registration, which he dates and subscribes.(m)

The pursuer or a Procurator of Court must next indorse and subscribe on the registered extract a minute asking for a warrant to search for, take, and apprehend the person of the

(i) 2 Bell's Com., 5th ed., p. 569; 7th ed., 460.

(j) Bell's Principles, § 1612.

(k) 1696, c. 41.

(l) 1 & 2 Vict. c. 114, § 10, *supra*, p. 342.

(m) *Ibid.* § 11.

defender; and, on his being apprehended, to imprison him till he fulfil the charge; and, if necessary for that purpose, to open shut and lock-fast places. If the warrant is desired by an assignee, authority must be got in the same way as if a charge were to be given by an assignee.<sup>(n)</sup> The form of minute for craving the warrant of imprisonment is given in the Personal Diligence Act,<sup>(o)</sup> and requires to be carefully followed. It is enough, however, that the minute be signed by the pursuer or his procurator, though it be written by another.<sup>(p)</sup> The statutory form requires the place and date of the minute to be given. It was not held to be an objection that this date showed the minute to have been written before the execution was registered, as it had not been used till after.<sup>(p)</sup> But if the place and date be omitted, the minute will be invalid.<sup>(q)</sup>

On the minute being presented, the Sheriff-Clerk (if there be no lawful cause to the contrary) writes on the extract the deliverance "*Fiat ut petitur*," which he dates and subscribes. Under this authority it is now lawful to take all the steps for which the minute asked authority, and all keepers of prisons are bound to receive and detain the defender till liberated in due course of law.<sup>(r)</sup>

**7. Apprehending the Defender.**—The officer, duly instructed by the pursuer, and armed with the warrant, is now bound to search for and take the person of the defender. The apprehension is completed by the officer taking him and telling him that he is his prisoner. The exhibition of the "blazon," or

(n) 1 & 2 Vict. c. 114, § 12.

(o) *Ibid.*, Schedule 8.

(p) Allan v. Millar, 24th June, 1848,  
10 D. 1411.

(q) Jameson v. Wilson, 19th Feb.  
1853, 15 D. 414.

(r) 1 & 2 Vict. c. 114, § 11.

of the "wand of peace," is not required on apprehension : only in the event of resistance is it proper to show them, in order the more effectually to make the parties resisting incur the penalties of deforcement.(s)

Like all other acts of civil diligence apprehension cannot take place on Sunday, and it further appears that it is not lawful on general fasts proclaimed by Government. It would appear that the rule does not apply to parochial fasts.(t)

On the prisoner being apprehended it is the duty of the officer to take him to the nearest prison, unless the prisoner be so unwell that he cannot safely be moved, or unless the prisoner, as frequently happens, agrees to some other course, in order to have an opportunity of settling the claim.(u)

**8. Imprisonment of the Defender.**—The officer, on taking the prisoner to the gaol, must leave with the gaoler the warrant under which the apprehension was made, as the defender is entitled to require exhibition at any time of the authority on which he is detained.(v) The officer then enters the defender in the books of the prison, stating the cause of imprisonment. Lastly, the officer deposits ten shillings on behalf of the pursuer to meet any claim for aliment while in prison which the prisoner may make.(w) Out of this ten shillings the gaoler pays out aliment to the prisoner at a rate not exceeding one shilling per day.(x)

**9. Alimenting the Defender in Prison.**—The public authorities are not bound to support in prison persons imprisoned

(s) *Scott v. North of Scotland Bank*, 18th Jan. 1855, 17 D. 292.

(t) 2 Bell's Com., 5th ed., 569; 7th ed., 460.

(u) *Garden v. M'Coll*, 13th Dec. 1826, 5 S. 123.

(v) 2 Bell's Com., 5th ed., 544; 7th ed., 437. Professor Menzies (Lectures, 3rd ed., p. 300) says it is enough to leave a certified copy of the warrant.

(w) 6 Geo. IV. c. 62.

(x) 45 & 46 Vict. c. 42, § 8.

for civil causes. If the prisoner cannot maintain himself, the creditor is obliged to do it, (y) though it would appear that if the prisoner be in prison for failure to perform an act which he has it in his power to perform, the creditor cannot be compelled to aliment him. (z) In this case it would appear as if the prisoner must remain unalimented till hunger forces him to render due obedience to the decree. There is a summary mode of ascertaining and enforcing the prisoner's right to aliment. (a) He applies by petition to the Sheriff, (b) who thereupon fixes a time for examining him on oath, and, where it can conveniently be done, appoints intimation of this to be given to the incarcerator, or his agent. (c) At the time fixed the prisoner is examined on oath regarding his ability to aliment himself in prison ; and the examination should be limited to this and not be permitted to extend, like a bankruptcy examination, to his whole affairs. (d) On the question whether he has means of

(y) *Smith v. Nicolson*, 31st May, 1853, 15 D. 697.

(z) *Brechin v. Taylor*, 9th March, 1842, 4 D. 909.

(a) See Act of Grace and Amending Acts, printed in App. part ii.

(b) The application used to be made to the burgh magistrates, but the Sheriffs got co-ordinate jurisdiction by 7 & 8 Vict. c. 34, § 13. This enactment was repealed by 23 & 24 Vict. c. 105, but the jurisdiction was renewed by § 76 of that Act. This enactment again has been repealed by 40 & 41 Vict. c. 53, but as that Act, in a definition clause, says that nothing contained in it is to alter the law with respect to the powers and jurisdiction at present possessed by the Sheriff in applications for aliment, it may be held that these still continue, though it is an odd proceeding to repeal

all the enactments giving them, and then to say that they are not to be affected. As the Sheriff takes the place of the burgh magistrates, the application I think ought to be made to the Sheriff having jurisdiction where the prison is situated. Some other Sheriffs, however, take an opposite and very inconvenient view, and require the application to be made either to the Sheriff of the prisoner's domicile, or to the Sheriff on whose warrant the imprisonment proceeds.

(c) *M'Kenzie v. M'Lean*, 14th Jan. 1830, 8 S. 306. If there be more than one incarcerator, intimation to the one from whom aliment is asked is enough ; *Anderson v. Dingwall Magistrates*, 15th Jan. 1823, 2 S. 116.

(d) A. S., 12th Nov. 1825, Part II. c. 4. This Act of Sederunt was passed

subsistence, his oath is conclusive in the first instance, though the creditor may adduce evidence to contradict it.(e) In general, however, this is not worth the pursuer's while, as the prisoner getting aliment is bound on demand to execute a disposition *omnium bonorum* for behoof of his creditors, and under this the creditor may take any property of which he has knowledge.(f) This disposition requires no stamp.(g) When aliment is awarded, the creditor must within ten days lodge money to meet any aliment then past due, and future aliment.(h)

**10. Liberation of the Defender.**—The defender may be liberated on performance of the obligation, or on the written consent of the incarcerator,(i) or (where aliment has been allowed, as explained in the preceding article) on the incarcerator failing to provide the aliment.(j) He may also be liberated by the order of a court, pronounced in a competent

for the guidance of the burgh magistrates, and is the only instruction on the point.

(e) A. S., *ut supra*. In *Minorgan v. Hogg*, 9th June, 1824, 3 S. 116 (decided before the A. S.), the Court had held that the pursuer could not bring evidence to rebut the oath.

(f) 6 Geo. IV. c. 62, § 7.

(g) 55 Geo. III. c. 184, sch. ii. § 5; *Rae v. Henderson*, 23rd Feb. 1837, 15 S. 653. The Commissioners of Inland Revenue think the deed exempt even though granted in favour of a third party; *Journal of Jurisprudence*, vol. 14, p. 125. In practice the exemption is not understood to be affected by 33 & 34 Vict. c. 97 and c. 99.

(h) *M'Iver v. Linlithgow Magistrates*, 29th Nov. 1832, 11 S. 144. The day of

imprisonment is not counted; *Gibb v. Hamilton Magistrates*, 13th Nov. 1833, 12 S. 28. See also *Thomson v. Magistrates of Kirkcudbright*, 23rd Jan. 1878, 5 R. 561.

(i) Where there were two creditors in the warrant, the Court in one case held that the consent of both was required for liberation; but the case was peculiar, and it would depend on how the debt was payable; *Campbell v. Mullen*, 15th Nov. 1850, 13 D. 78.

(j) 1696, c. 32. If the aliment be not lodged on the *tenth* day from intimation, the debtor is liberated; *Hood v. Mackirdy*, 14th Dec. 1813, F. C. But where a third of a day's aliment is left it is premature to liberate in the morning; *White v. Robertson*, 24th Nov. 1858, 21 D. 28.



process ; and if he were imprisoned on a decree *ad factum præstandum*, which he could show that he had no power to obey, the Court of Session (in the process of suspension and liberation) would liberate him at once in the exercise of their equitable power.

**11. Re-imprisonment.**—When the prisoner has been liberated for any cause less than the performance of the obligation or an order of protection, he can be re-imprisoned on the same diligence.<sup>(k)</sup> Should this power, however, be used oppressively, the Court of Session may interfere.<sup>(l)</sup>

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## Section II.—ACTIONS OF ALIMENT.

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| 1. <i>Nature of Action.</i>                      | 5. <i>Enforcement by Poinding and Arrestment.</i> |
| 2. <i>Remedy if Question of Status Involved.</i> | 6. <i>Enforcement by Imprisonment.</i>            |
| 3. <i>Remedy where no Question of Status.</i>    | 7. <i>Mode of Application.</i>                    |
| 4. <i>Decree for Aliment.</i>                    | 8. <i>Disposal of the Application.</i>            |
|  | 9. <i>Further Explanations.</i>                   |

**1. Nature of Action.**—The action of aliment is a summary action, entitled to extraordinary despatch, and to proceed during vacation as during session. It commences by an ordinary petition, and proceeds in all respects as if it were an ordinary action, except in two particulars. The Sheriff has power, in the exercise of his discretion, to award interim aliment at any time ; and, in addition to the ordinary modes of execution by poinding and arrestment, the Legislature

<sup>(k)</sup> *Forgie v. Stewart*, 20th July, 1876, 3 R. 1149 ; *Pender v. M'Arthur*, 28th Jan. 1846, 8 D. 408.

<sup>(l)</sup> See *Crawford v. Dawson*, 11th March, 1836, 14 S. 688.

has provided a summary mode of enforcing, by imprisonment, obedience to the decree.

**2. Remedy if Question of Status Involved.**—By the Act 11 Geo. IV. & 1 Will. IV. c. 69, (a) all actions of aliment are competent in the Sheriff Court. But this must be understood to apply only to cases where not only the conclusions, but the grounds of action also, raise nothing but a question of aliment. Where the grounds of action involve a question of status as the primary ground of liability there is no jurisdiction. Thus, a pursuer founding on an irregular marriage, which is denied, cannot sue for aliment in the Sheriff Court, because the main question here is whether the parties have been married. (b) On the other hand, if the parties have been publicly married, the action is competent, and the defender would not be allowed to plead in the Sheriff Court that the marriage was invalid. (c)

The same principle is applicable when any other question of status is raised ; for example, the right of married persons to live separate. If a wife sue her husband for aliment, stating that she has been obliged to separate from him on account of ill-treatment, and that she cannot therefore return to him, the action is incompetent in the Sheriff Court. (d)

(a) § 32. The Act seems to have been passed to remove doubts, probably those caused by *Jackson v. Jackson*, 3rd March, 1825, 3 S. 610.

(b) *Benson v. Benson*, 14th Feb. 1854, 16 D. 555.

(c) *M'Leod v. Telfer*, 9th June, 1820, Hume, 10 ; *Wylie v. Hamilton*, 8th July, 1824, F. C. ; *Reid v. Black*, 3rd June, 1814, Hume, 5.

(d) *Braick v. Braick*, 19th Dec. 1829, 8 S. 284. This case was decided before

the Act of William IV., but its authority is still applicable, as it proceeded on the ground that in such circumstances the action resolved itself into one of adherence or separation. In *Rennie v. Rennie*, 7th Feb. 1863, 1 M. 389, and *M'Gregor v. Martin*, 12th March, 1867, 5 M. 583, where such questions were tried in the Sheriff Court, the objection was not taken. See *Hood v. Hood*, 24th Jan. 1871, 9 M. 449.

Again (for the same reasons) if the wife has been turned out of the house, and sues for aliment, the action must be dismissed if the husband (in good faith) offers to take her back. In such cases the Sheriff Court can, however, award interim aliment; but that only.<sup>(e)</sup> The power to award interim aliment in such cases must not be used so as to award what would practically be permanent aliment, but should be limited to awarding it for a certain fixed period sufficiently long to enable the injured party to take the necessary steps in the Court of Session for obtaining permanent redress.<sup>(f)</sup>

**3. Remedy where no Question of Status.**—Where no question of status is involved,—as in a case of father and son, where the relationship is admitted—there is jurisdiction.<sup>(g)</sup> The same principle ought to apply where the relationship once existing has been legally dissolved,—as where a wife has been legally separated from her husband,—but even here it has been held that the Sheriff can interfere only when justified by the ground of absolute necessity.<sup>(h)</sup> In the case of illegitimate children, no question of status is raised even though the paternity is disputed.<sup>(i)</sup> The enforcement of the duty of parents to their illegitimate children is mainly done through the Sheriff Courts. Under the Summary Jurisdiction Process Act of 1881, the English Courts of summary jurisdiction may indorse the warrants of the Sheriff Courts for citation or

(e) *Smith v. Smith*, 11th June, 1874, 1 R. 1010.

(f) *M'Donald v. M'Donald*, 25th May, 1875, 2 R. 705; *Niven v. Niven*, 21st Feb. 1877, *Guthrie's Select Cases*, p. 30.

(g) *Tait v. White*, 28th Feb. 1802, M. Appx. Aliment, No. 3; *M'Kissock v. M'Kissock*, 14th Feb. 1817, *Hume*, 6; *Wilson v. Cockpen Heritors*, 18th

Feb. 1825, 3 S. (O. E.) 547.

(h) *Hay v. Hay*, 24th Feb. 1882, 9 R. 667.

(i) On the questions raised in the preceding paragraphs the reader may find some light in some Sheriff Court cases, reported in the *Journal of Jurisprudence*, vol. 13, p. 351, and vol. 17, p. 427.

execution in such cases, and enforce obedience to them ; and in the same way the Sheriff Courts must help the English Courts.(j)

**4. Decree for Aliment.**—Aliment being a debt, the amount of which cannot in certain cases be fixed for any definite period, as the liability may vary with the circumstances of the payer and receiver, care should be taken that judgment is not pronounced, in such cases, in such a form as to prevent the rate being altered at any future time.(k) As the decree for aliment may still be enforced in a certain way by imprisonment, it would appear that the extract should still contain a warrant for it. At all events this seems to be the view of the Court of Session, for though the Civil Imprisonment Act of 1882, has abrogated ordinary civil imprisonment for alimentary debts, and substituted a summary mode of proceedings, the direction as to the form of extract contained in the Act of Sederunt of 8th January, 1881, has not been modified.

**5. Enforcement by Poinding and Arrestment.**—The decree for aliment is enforced in all respects in regard to poinding and arrestment in the same way as a decree for an ordinary debt. The only point of difference is that wages under twenty shillings (which cannot be arrested for payment of an ordinary debt) may be arrested for payment of an alimentary debt.(l) Here the former law applies, and everything beyond what is necessary for the debtor's own subsistence may be taken from

(j) 44 & 45 Vict. c. 24. The Act seems to affect procedure only, and not jurisdiction.

(k) *Thom v. Mackenzie*, 2nd Dec. 1864, 3 M. 177.

(l) 33 & 34 Vict. c. 63. It will be

noticed that this Act makes no difference between alimentary and ordinary claims in regard to arrestment in security, which for wages under 20s. is incompetent in both cases.

him.(m) What is necessary for the debtor's subsistence is a question of fact.

**6. Enforcement by Imprisonment.**—The Civil Imprisonment Act of 1882 limits the power of imprisoning, for failure to pay alimentary debts, to the use of the procedure which it introduces.(n) The provisions above explained,(o) therefore, with reference to imprisonment, are, in so far as they are subsequent to the charge, inapplicable. The Act of 1882 does not prescribe that there is to be any necessity for registering the execution of charge.

The person against whom the warrant to imprison is applied for must be a person "who wilfully fails to pay within the days of charge any sum or sums of aliment,(p) together with expenses of process, for which decree has been pronounced against him by any competent court." The failure is presumed to be wilful until the contrary is proved. Under the old law, it was a matter of indifference whether the sum due was under or over the limits of £8, 6s. 8d., under which imprisonment for ordinary civil debt was incompetent;(q) and under the new law this must be the same. From the wording of the statute, it is clear that the days of charge must have expired before the application is presented. The decree may be one of any competent court, which would include that of any English or Irish Court, proceeding under the Summary Jurisdiction Process Act, mentioned in Article 3.

(m) 1 Vict. c. 41, § 7; *Shanks v. Thomson*, 10th July, 1838, 16 S. 1353.

(n) 45 & 46 Vict. c. 42, § 4.

(o) *Supra*, p. 380.

(p) This does not cover failure to repay aliment which has been advanced

by a parochial board; *Tevendale v. Duncan*, 20th March, 1883, 20 S. L. R. 558.

(q) *Cheyne v. M'Gungle*, 19th June, 1860, 22 D. 1490.

**7. Mode of Application.**—The application may be made “by the creditor in the sum or sums decerned for.” In the case where the expenses are made by the decree payable to the agent who has disbursed them, this would seem intended to empower him to use the Act, and thus to get over the doubt which existed, under the former law, whether expenses so payable could be considered as an alimentary debt. No concurrence is required by the creditor when applying for the warrant to imprison. This provision has been introduced in order to show that, although the proceeding may have something of the criminal character about it, the concurrence of the procurator-fiscal is unnecessary.<sup>(r)</sup>

The Act says the application is to be disposed of summarily, and without any written pleadings.<sup>(s)</sup> This infers that the application itself must be written; and, indeed, a written application of some kind seems indispensable. No form for it being prescribed, I see no good reason why a minute, indorsed somewhat in the old manner, on the execution of charge, should not be enough. For a thing which is really a step in diligence, a complete petition, with condescendence and pleas in law, can hardly have been intended to be requisite; though, looking at the consequences which attend an error in judgment in the use of diligence, probably an agent would do well to use a form to which no possible objection could be taken. As the Act contemplates that the debtor is to be allowed an opportunity of proving that the failure to pay is not wilful, it is plain that he must have an opportunity of being heard and of adducing evidence before the warrant is granted. A diet for disposing of the application should, therefore, be fixed, and intimation of it made to the debtor. Some reasonable period of notice should be allowed him after cita-

<sup>(r)</sup> 45 & 46 Vict. c. 42, § 4 (1).

<sup>(s)</sup> *Ibid.*, § 4 (2).

tion—say, forty-eight hours; and as it is doubtful whether the Act authorising Postal Citation applies to diligence, the intimation should be served in the ordinary way. Ordering the defender to enter appearance or lodge answers is excluded by the direction that there are to be no written pleadings. When the debtor comes to the diet, he should be prepared to lead his evidence, if he has any, to explain the reasons for non-payment; but if an adjournment of the diet is required, there seems no reason why the Sheriff should not give one. There seems no power to pronounce a warrant of detention during the interval.

**8. Disposal of the Application.**—At the diet (original or adjourned) for disposing of the application, the Sheriff will hear any evidence which the parties may adduce. If there be evidence, it will be for the debtor to commence—the burden of proof being upon him.<sup>(t)</sup> Any evidence competent in any civil proceeding would seem competent. The application being a proceeding which is taken against a person who is not charged either with an indictable offence, or with an offence punishable on summary conviction, the evidence of the debtor or his wife seems competent.<sup>(u)</sup> The Act does not say that the evidence is not to be recorded; but when it says that the application is to be disposed of summarily, it can hardly mean anything else. If the debtor succeeds in proving to the satisfaction of the Sheriff, that “since the commencement of the action in which the decree was pronounced,” he has not possessed or been able to earn means to pay what is in default, or such instalment thereof as the Sheriff shall consider reasonable, the application will be refused. If satisfactory proof to this effect be not adduced, the application must

(t) 45 & 46 Vict. c. 42, § 4 (3).

Miller v. Bain, 9th July, 1879, 6 R.

(u) 16 Vict. c. 20, § 3; compare 1215.

be granted, and in that case the Sheriff grants a warrant to commit the debtor for any period not exceeding six weeks, or (A) until payment of the sum or sums of aliment and expenses of process decerned for; or (B) until payment of such instalment or instalments thereof as the Sheriff may appoint; or (C) until the creditor be otherwise satisfied. The Act has evidently here intended that the Sheriff should have power to order payment of the arrears by more than one instalment; but the exercise of this power will be found impossible, and where the Sheriff does not appoint the whole arrears to be paid up, he should name the sum to be paid. There seems no reason why he should not allow a few days to the debtor to make the payment.

The Act contains no power to award expenses to the successful party. If the applicant be successful, it would appear right that he should have expenses; but the Act does not authorise these to be recovered by imprisonment, and fails to give authority for their recovery by other diligence. Had the proceedings been judicial, expenses might have been given as falling incidentally under the power to dispose of the merits; but, seeing that the proceedings partake much more of the character of the enforcement of diligence, the rule that the creditor recovers nothing, except what the decree or the special powers of the law give him, would appear applicable. Whether the applicant might not recover the expenses in a small-debt action, in the same way in which other expenses in connection with diligence may sometimes be recovered, seems not quite so clear.<sup>(v)</sup> If it is the debtor who is successful, there seems no reason why he should get expenses. His expenses are incurred solely for his own protection, and are caused by no default on the part of his opponent.

(v) *Supra*, p. 345.



As the powers are given to the Sheriff or Sheriff-Substitute, but not to both, there seems no power of appeal.

**9. Further Explanations.**—If any balance remain due under the decree, a warrant of imprisonment may be granted of new, at intervals of not less than six months, which, it is presumed, would run from the date of granting. The new warrant may be granted for failure to pay the same sum of aliment and expenses as that due at the time of the former application, or any balance of it left, or any aliment afterwards accruing under the decree.<sup>(w)</sup>

Imprisonment under this application, it has been specially (though somewhat superfluously) provided shall not operate as in any way a satisfaction or extinction of the debt, and shall not interfere with the creditor's other rights and remedies for its recovery.<sup>(x)</sup>

Under the former law, the absurdity was perpetrated of requiring a person, who presumably could not aliment himself, to aliment his debtor, while he kept him in prison. This is no longer necessary. The prisoner is now treated in every respect as if he had been committed for contempt of court.<sup>(y)</sup> For the treatment of such prisoners the Prisons Act makes provision.<sup>(z)</sup>

The number of applications under the Civil Imprisonment Act of 1882 has been very large, and the disclosures as to the inefficiency of the former law to enforce the natural obligations of parents and other relatives, greater than any one could have conceived possible. The new law promises to be much more efficient.

(w) 45 & 46 Vict. c. 42, § 4 (4).

(x) *Ibid.*, § 4 (5).

(y) *Ibid.*, § 4 (6).

(z) 40 & 41 Vict. c. 53, § 47. They are treated very much like untried criminal prisoners.

## Section III.—PROCEEDINGS UNDER CONJUGAL RIGHTS ACTS.

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| <ol style="list-style-type: none"> <li>1. <i>Nature of Remedy.</i></li> <li>2. <i>Mode of Application.</i></li> <li>3. <i>Undefended Causes.</i></li> <li>4. <i>Defended Causes.</i></li> </ol> | <ol style="list-style-type: none"> <li>5. <i>Intimation of Order.</i></li> <li>6. <i>Appeal against Order.</i></li> <li>7. <i>Recall of Order.</i></li> <li>8. <i>Dispensing with Husband's Consent to Deed.</i></li> </ol> |
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**1. Nature of Remedy.**—Under the Conjugal Rights Amendment Act of 1874, a jurisdiction was conferred upon the Sheriff Courts, which was of great value at the time. Under the corresponding Act of 1861 the Court of Session had power given to it to grant to deserted wives, orders protecting their property from their husbands, or husbands' creditors. The expense of procedure under that Act, however, prevented many persons from availing themselves of its benefits, and it was found necessary to extend the power to the Sheriff Court.(a) Since 1874 two Acts have been passed, which limit very much the necessity for taking proceedings under the Conjugal Rights Acts. The Married Women's Property Act of 1877(b) excludes the husband's *jus mariti* and right of administration from all property acquired by the wife through her own industry after its date (2nd August). The Married Women's Property Act of 1881,(c) excludes the *jus mariti* and right of administration entirely in the case of all marriages contracted after its date (18th July), and excludes them in so far as concerns property subsequently acquired, in the case of those married at its date. No person married after 18th July, 1881, can have occasion to use the Conjugal Rights Acts, but as those wives who were married and succeeded to pro-

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| <p>(a) 24 &amp; 25 Vict. c. 86, sections 1 to 5, inclusive, and 37 &amp; 38 Vict. c. 31, both printed in the Appx. Part II.</p> | <p>Chapter III.<br/>(b) 40 &amp; 41 Vict. c. 29.<br/>(c) 44 &amp; 45 Vict. c. 21.</p> |
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perty prior to that date, or who were married and made earnings prior to 2nd August, 1877, may still have occasion to use them, an account of the proceedings is still given.

The persons who may apply are wives deserted by their husbands. The remedy asked is an order "to protect property that they have acquired, or may acquire, by their own industry after such desertion, and property which they have succeeded to, or may succeed to, or acquire right to after such desertion, against their husbands or creditors of their husbands, or any persons claiming in or through the rights of their husbands."(*d*) The order, when duly granted and intimated, has during its subsistence the effect of a decree of separation *a mensa et thoro*, in regard to the property, rights, and obligations both of the husband and of the wife. It has also the effect of such a decree in regard to the wife's capacity to sue and be sued.(*e*) The Statute adds that the property which the protection covers, that is, what has become the wife's after desertion "shall belong to her as if she were unmarried." But there is exempt from the protection—(1) property of which, before the date of the application, the husband has lawfully obtained full and complete possession; (2) property which, before the date of the order, a creditor has attached by arrestment followed by a decree of furthcoming; and (3) property which, before the date of the order, the creditor has poinded, and of which he has carried through and reported a sale.(*f*) It will be observed that in these exemptions the husband's rights end with the date of presenting the petition, while the creditors' rights do not end till the actual granting of the order.

## 2. Mode of Application.—The wife makes the application

(*d*) Act of 1874, § 2, and 1861, § 1.

(*f*) *Ibid.* § 4.

(*e*) Act of 1861, § 5.

by petition in the ordinary form in use in the Sheriff Court.(g) It should set forth the fact of the marriage and the date of the desertion, and pray for an order in terms of the statute. The Sheriff upon this grants an order for intimation.(h) If the husband be subject to the Sheriff's jurisdiction, it is apparently left for the Sheriff to fix the *induciae* in the usual manner, and order service. Where the husband has left Scotland the Sheriff's jurisdiction still subsists, but the *induciae* must be twenty-one days, the citation must be edictal, and a copy of the petition must be sent to his last known address.(i)

**3. Undefended Causes.**—If appearance be not entered on the expiry of the *induciae*, the Sheriff proceeds to dispose of the cause. He is directed to require evidence of the desertion. On comparing this direction with the anxious way in which he is directed how to take the proof in defended causes, it might be supposed that he was not bound to take proof in undefended causes in the ordinary way, but might proceed on any evidence which might be satisfactory to himself. It may, however, save trouble, and be more regular, if he appoint and take a proof in the usual way. If it be sufficient he will at once grant the order of protection.(j)

**4. Defended Causes.**—Appearance to defend the cause may be entered either by the husband or by any creditor claiming through him. There is no provision for intimation to creditors, and no express words giving them power to appear; but, as their power to oppose is recognised,(k) they must have the means of making it effectual. Where appearance is entered

(g) Act of 1874, § 2 (1).

1861, § 1.

(h) Act of 1874, § 2 (2); Act of 1861, § 1.

(j) Act of 1861, § 1.

(k) Act of 1861, § 1 and § 2.

(i) Act of 1874, § 2 (5); Act of

a record must be made up.<sup>(l)</sup> In the Court of Session it is made up by allowing answers to be received; but although this mode does not seem incompetent, it would be preferable to close the record on defences, in terms of the Act of 1876. On the record being closed the parties are allowed a proof, which is to be taken in the usual way. It is to be observed that in defended causes the Sheriff must be satisfied, in addition to the fact of desertion, that it was without reasonable cause. This point is to be determined by reference to the whole circumstances of the case; but it would appear that no conduct on the part of a wife will justify the desertion, unless it were such as would ground an action of separation or form a defence to an action of adherence. If an offer to resume cohabitation be made, the Sheriff will judge if it be made *bona fide*.<sup>(m)</sup> On being satisfied of the desertion and its unreasonableness, the Sheriff pronounces the order.

**5. Intimation of Order.**—On the order of protection being granted, the Sheriff must appoint it to be intimated by advertisement in one or more newspapers published within the county within which the wife is resident, or in such other papers as he thinks fit.<sup>(n)</sup>

**6. Appeal against Order.**—On being pronounced and intimated the order takes immediate effect, unless in the order itself, or in another order pronounced within forty-eight hours after it, the effect is suspended till the issue of an appeal, or for such other period as the judge may think right.<sup>(o)</sup> Where the order is pronounced by the Sheriff-Substitute there is an appeal

(l) Act of 1874, § 2 (1).

(m) *Chalmers v. Chalmers*, 4th March,

1868, 6 M. 547.

(n) Act of 1861, § 1.

(o) Act of 1861, § 3.

to the principal Sheriff; and by whichever Sheriff it may have been pronounced, there is an appeal to the Court of Session—both to be taken in the usual way.(p)

**7. Recall of Order.**—The return of the husband to cohabitation with the wife apparently operates as a tacit recall of the order,(q) but it may also be formally recalled. Where the petition has not been defended, the husband or a creditor may apply by petition to the Sheriff for the recall, and the Sheriff (after appointing answers by the wife) is to dispose of the application as he shall think just.(r) The proceedings in this case are analogous to a reponing (under the old forms) against a decree in absence; but the petition for recall must be presented to the Sheriff to whose jurisdiction the deserted wife is for the time amenable.(s) Where there has been an appearance by the husband, he may afterwards present a petition for recall, and the Sheriff may recall the order, if satisfied that the husband has ceased from his desertion, and is again cohabiting with the wife. The petition in this case is also to be presented to the Sheriff to whose jurisdiction the wife is for the time amenable. In this case the husband may be required to find security, for such period as may be fixed, that he will continue to cohabit with the wife.(t)

The recall does not affect any right or interest acquired during the subsistence of the order.(u)

(p) Act of 1874, § 2 (1). In appeals to the Court of Session the proceedings need not be printed; *ibid.*, § 2 (4).

(q) Act of 1861, § 3: "Such order of protection shall, *where there has been appearance by the husband*, continue operative until such time as the wife shall again cohabit with the husband." The words in italics seem to have got in by inadvertence.

(r) Act of 1861, § 2.

(s) Act of 1874, § 2 (3). The Clerk of the Court in which the order was granted is to transmit the proceedings in the original petition on receiving notice of the dependence of the application for recall.

(t) Act of 1861, § 3; Act of 1874, § 2 (3).

(u) Act of 1861, §§ 2 and 3.

**8. Dispensing with Husband's Consent to Deed.**—By the Married Women's Property Act of 1881 (§ 5), it is provided that, "where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate." (v) This petition would be presented at the wife's instance; and as the husband is the person interested in opposing it, he would have to be called as defender. The petition will, therefore, have to be raised in the Sheriff Court to the jurisdiction of which he is subject. If he be not subject to the jurisdiction of any Sheriff Court, and, as often happens in such cases, his residence be unknown, the proceeding will have to be taken either in the Supreme Court or in the Court of the Sheriff to whose jurisdiction the wife is for the time amenable, which, as the proceeding is purely remedial, would seem to be competent. The petition would be drawn in the ordinary form, and served, where the husband's residence is known, like an ordinary action. If the husband's residence be unknown, the Sheriff will have to judge what intimation, if any, is desirable. When opposed, the action would have to proceed in the ordinary way. If unopposed, it would, however, not be advisable to allow a mere decree in absence. The Act evidently contemplates that the judge is to apply his mind to the matter. The facts ought, therefore, to be explained and proved to him, and the interlocutor should show that the requisite order was granted after consideration.

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(v) 44 & 45 Vict. c. 21, § 5.

#### Section IV.—ACTIONS OF CONSTITUTION AND OF ADJUDICATION.

##### 1. *Action of Constitution.*

##### 2. *Action of Adjudication.*

**1. Action of Constitution.**—Every action for payment of debt is in one sense an action of constitution, but the term is specially applied to actions brought against the representatives of deceased debtors.

When the deceased debtor is represented by executors who have confirmed, the action is in the common form, and concludes against the executors, as such, for payment of the debt. The conclusion for expenses should, however, be so worded as to ask for them in the event only of the claim being opposed; for it is a rule of Court that a creditor is bound to constitute his debt against his debtor's representatives at his own expense. If the action, however, be opposed, it is held to be no longer in the position of a mere constitution, but to become a different kind of process; and in that case the party who is unsuccessful is liable in the usual way in the whole expenses.<sup>(a)</sup>

Where the persons entitled to the office of executor to the deceased debtor have not taken steps to have themselves confirmed, the creditor cannot (except in two cases) bring his action of constitution against them without first "charging"<sup>(b)</sup> them to take up the office. The excepted cases are where those persons have acted as executors without authority, or where the creditor means to be content with what is called a

(a) *Smith v. Kippen*, 19th July, 1860, 22 D. 1495. It should be kept in view that the executor cannot be compelled to pay till six months after

the death.

(b) The charge to confirm as executor proceeds on letters passing under the Signet.



decree *cognitionis causa tantum*, which gives him right to attach the goods of the deceased debtor for his debt, but imposes no kind of obligation on the persons called as defenders.(c) In bringing the action, the next-of-kin of the deceased, and any persons he may have nominated as executors by will, are cited as defenders. As in the case of actions against confirmed executors, expenses should not be asked unless in the event of the action being opposed. If the action have been brought for the ordinary decree, the conclusions may be restricted to ask decree of cognition only; but in such a case the defenders would be entitled to the expense of appearing to get this restriction made. Where, however, a charge has been given, and the persons entitled to be executors pay no attention to it, either by confirming or by renouncing the succession, they may be found liable in any expenses their negligence may occasion.(d)

Actions of constitution against the heir of a deceased debtor, with the view of afterwards adjudging heritage, are competent in the Sheriff Court.

**2. Action of Adjudication.**—An action of adjudication is the means by which an heritable estate is taken in payment of a debt; and it is also used, in the form of an adjudication in implement, when a person has a title to an estate of an incomplete kind, and the person from whom he is entitled to exact what is necessary to its completion, refuses to fulfil the obligation he is under. All adjudications in use were at one time competent in the Sheriff Court, but since 1672 they have been competent only in the case of the death of a proprietor whose heir renounces the succession.(e) Even in this

(c) *Forrest v. Forrest*, 26th May, 1867, 6 M. 151.  
1868, 1 M. 806.

(e) Some information as to what adjudications were in use prior to 1672,

case, however, adjudications are now scarcely used in the Sheriff Court; and as all the provisions of the recent Conveyancing Acts have been adapted with a view to the Supreme Courts alone, the use of adjudications in the Sheriff Courts cannot be recommended until the matter has been put on some more satisfactory footing.<sup>(f)</sup> If any one thinks proper, notwithstanding this caution, to use the action against an heir who renounces, there does not seem any sufficient ground to believe that its competency would not be sustained. When used, it is always combined with an action of constitution. The prayer begins by calling on the heir to pay the debt; and it asks for adjudication of the heritage in the event only of the heir producing in process a valid renunciation of his rights.

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#### Section V.—ACTION OF COUNT AND RECKONING.

The action of Count and Reckoning, which is an ordinary action commencing by petition, is an action in which the pursuer concludes against the defender for exhibition of all accounts between them, and for payment of the balance due on a settlement of those accounts. The action usually contains an alternative conclusion for payment of a specified sum in the event of no accounting taking place; but this conclusion is not essential, and if it have been omitted it may be supplied on an amendment.<sup>(a)</sup> The use of this conclusion is to enable

and as to the state of the law then, will be found, by those who have any curiosity in such matters, in the *Journal of Jurisprudence*, vol. 23, pp. 540, 594, and 648; and vol. 24, pp. 40 and 90. The accuracy of the text of this paragraph was challenged by an able authority, but I have not seen reason to alter it.

<sup>(f)</sup> See 1 Bell's Com., 5th ed., 701; 7th ed., 740; Erskine, ii., 12, 39; 1672, c. 19.

<sup>(a)</sup> *Dobson v. Hughson*, 17th Feb. 1858, 20 D. 610. The usual conditions as to expenses on amending must of course be complied with.

the pursuer to get a decree for a definite sum in the event of the defender failing to appear, or appearing and failing to account. Should the accounting be gone into, the sum specified does not limit the pursuer's claim ; but he gets whatever turns out to be due, whether it be less or more.(b)

In an action of count and reckoning it seems necessary, where the defender insists on it, to make up and close a record before ordering production of the accounts, but except where the defender objects to account—upon such a ground, for example, as that he is under no liability to do so, or that he has already done so—this course is inconvenient, and is usually avoided. . Where an objection to account is to be stated, defences must be lodged, and a record closed. This question ought to be settled first, and it is only in very exceptional circumstances that the court would order the accounts to be produced while the right to see them was unsettled. A decision fixing the liability to account, and ordering the accounts to be produced, would probably (as being an order *ad factum præstandum*) be held to be appealable without leave.(c) When the accounts have been ordered,—either in respect of no defences or after these have been repelled and lodged,—the next step is to allow the pursuer, if so advised, to lodge objections to them, and the defender to lodge answers thereto within a specified period.(d) The subsequent steps will depend on the nature of the objections stated. If they involve nothing but questions of law, they may be disposed of without further procedure. Where other questions are involved, a remit to an accountant,(e) or a proof, may, according to circumstances, be proper. As a rule, investigation will not be

(b) *Spottiswoode v. Hopkirk*, 17th Nov. 1853, 16 D. 59.

(c) 39 & 40 Vict. c. 70, § 27.

(d) A. S., 10th July, 1839, § 87.

(e) *Ibid.* §§ 88 and 89.

allowed until the pursuer has stated his objections, but where his interest to have an accounting is established, and he cannot state his objections without it, a diligence may sometimes be allowed for the recovery of documents.

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### Section VI.—ACTION OF DECLARATOR.

#### 1. Competency.

#### 2. Procedure.

**1. Competency.**—Actions of declarator are competent under the Sheriff Court Act of 1877, to a limited extent. They are competent, firstly, in questions of heritable right or title, where the value of the subject in dispute does not exceed the sum of £50 by the year, or of £1000; and secondly, in questions relating to the property in, or right of succession to, moveables, where the value of the subject in dispute does not exceed £1000. (a) The object of a declarator is to ask the court to pronounce a decree declaring that the pursuer has, or that the defender has not, a certain right. In regard to the rights which can be so declared, they must be such as that, on the one hand, the pursuer has an immediate practical interest to set them up, and the defender, on the other hand, has a corresponding interest to deny them; and they must be in dispute. (b) Declaratory conclusions are usually introductory to conclusions for payment, or interdict, or *ad factum præstandum*; and they should never be used unless it be seen that without them the practical remedy would be incomplete. A full discussion of when declarators are competent or necessary at common

(a) 40 & 41 Vict. c. 50, § 8 (1) and (b) *Lyle v. Balfour*, 17th Nov. 1830, (2). As to jurisdiction, see *supra*, p. 54 9 S. 22. and p. 64.

law will be found in Mr. Mackay's Court of Session Practice, vol. ii., chap. 63, but it is unnecessary to resume it here. The points of difficulty have mainly arisen because in the Court of Session there are no statutory regulations defining when declarators may be used; but as the statute of 1877, in giving jurisdiction to the Sheriff Court, has defined the two cases where it may be used, it is apprehended that in the lower court no difficulties can occur.

It is an open question whether under the Sheriff Court Act of 1838, where jurisdiction is given in servitudes, declarators are competent.<sup>(c)</sup> If they are, they would be free from the restrictions to which they would be subject under the Act of 1877, and would be conducted throughout as ordinary actions.

**2. Procedure.**—Declarators under the Act of 1877 are conducted in every way in the same manner as ordinary actions, save in one or two points. The value in dispute should be set forth, so as to show that there is jurisdiction under the Act. If any question be raised as to this, the Sheriff is to determine it in (what may be called) a summary manner. The defender, if he wishes to raise the question, must take care to do so in his defences, so that, if it be decided against him, he may be in time to remove the case to the Court of Session if he thinks right. The Sheriff is to inquire into the point in such a way as he thinks expedient, and the decision of the presiding Sheriff on it is final. If he finds that the value is too great, he may either dismiss the action, or (on the pursuer's motion) direct it to be transmitted to the Court of Session.<sup>(d)</sup> If the objection as to value be repelled,

(c) 1 & 2 Vict. c. 119, § 15, *supra*, p. 65, note (a). (d) 40 & 41 Vict. c. 50, § 10.

or if no objection be taken, a record is made up in the usual manner. The defender may, however, at any time, either before the record is closed or within six days after the closing, of his own motion remove the case to the Court of Session. He makes this motion by lodging a note in process in the statutory form praying that the case may be transmitted to the Court of Session. Where a case has to be transmitted, either on this motion or because the Sheriff has ordered it, on finding the value too large, the Sheriff-Clerk forthwith sends the process to the Keeper of the Rolls of the First Division, who (under the Lord President's directions) marks on it the Division and Lord Ordinary before whom it is to depend, and transmits it to the appropriate depute-clerk.(e) After that it goes on as if it had begun in the Court of Session, though a defender, who has removed a cause, may, if successful, obtain nothing but such expenses as he would have obtained in the Sheriff Court.(f)

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#### Section VII.—ACTION OF DIVISION.

1. *Division of Commonly.*
2. *Action of Division.*

3. *Division and Sale.*

Three actions of division are now competent (under the Act of 1877) in the Sheriff Court. These are—(1) the action of Division of a Commonly, (2) the one usually known as the action of Division, and (3) the action of Division and Sale. The value of the "subject in dispute," which (it is presumed) means the common property to be divided, must not exceed the sum of £50 by the year, or £1000.(a) The provisions as

(e) 40 & 41 Vict., §§ 9 (1) and 10.

(a) 40 & 41 Vict. c. 50, § 8 (3).

(f) *Ibid.* § 9 (2).

to settling the value, if it be disputed, and as to removing the cause to the Court of Session, are in all respects the same as those just explained with reference to actions of declarator. Actions of division must be brought in the Sheriff Court of the county in which the common property is situated, in the same way as any other action concerning heritage. If the property lies partly within two jurisdictions, there is apparently no power in either the one or other to entertain the action.

1. **Division of Commonly.**—Where a commonly is not worth more than £1000 in all, or £50 a-year, any one of the proprietors in common may call the others into the Sheriff Court to have it divided.<sup>(b)</sup> The procedure in similar cases in the Court of Session is regulated by the Act of Sederunt of 18th June 1852, and its provisions, so far as they can be applied to Sheriff Court procedure, should be followed. In the Court of Session the conclusions of the summons rehearse all the steps of procedure which have to be taken, but to do so in the prayer of the petition in the Sheriff Court would be inconsistent with the Act of 1876; and the prayer ought therefore to be limited to the remedies asked—namely (1) an order on the defenders to produce their titles; (2) a declarator that the common ought to be divided among the pursuer and defenders, according to their respective rights and interests; and (3) a prayer to the Sheriff that he would cause it to be so divided, and direct the divisions falling to each proprietor to be properly marked off. The conclusions usual in a Court of Session action, praying that evidence be taken as to the extent of the common, its nature, or the interests of the competing claimants in it, and that remits be made to valuers and surveyors seem all out of place. The

(b) 1695 c. 38; 40 & 41 Vict. c. 50, § 8 (3).

condescendence describes the commony (with reference to a plan), sets forth the pursuer's title and interest, and concludes with his claim.(c) It should also set forth the value of the commony.(d)

The petition will be served like an ordinary petition. Each defender who appears lodges defences, setting forth—(1) the nature of his right and interest, and (2) the extent of his claim. He should also produce his titles. Against any defenders who fail to do so, as well as against those who do not enter appearance, an order will be pronounced appointing their production. If it be found that all parties are agreed as to the division of the common, and as to the extent of their respective interests and claims, the making of a record seems unnecessary; but if there be disputes on these points, a record must be made up and those points decided. The Sheriff will then consider what proof should be allowed. The next step will be to remit to a surveyor, or other man of skill, to examine the common and prepare a scheme of division, with a relative plan. If parties do not acquiesce in this scheme, objections and answers will be ordered. After these are disposed of, there must be a remit to prepare a final scheme of division, unless the parties agree upon one, or agree to draft the final interlocutor. The decree has the effect of a conveyance to the parties, and (like one) may be recorded in the Register of Sasines, under the Conveyancing Act of 1874.(e)

**2. Action of Division.**—This is also an action relating to heritable property, and is competent when within the value above explained. It is the form taken when one of several joint proprietors desires to have the joint property divided,

(c) A. S., 18th June, 1852; Juridical  
Styles, 2nd ed., vol. 3, p. 149.

(d) *Supra*, p. 405.

(e) 37 & 38 Vict. c. 94, § 35.



and to have his share set aside to him. The form of petition will be much like that used for a division of commonry; but in adapting the Court of Session summons to the Sheriff Court the same caution is needed—namely, that the prayer should not call for the steps of procedure, but simply for the remedy.<sup>(f)</sup> The essential conclusions seem to be—(1) one of declarator, that there ought to be a division; (2) one praying the Sheriff to cause the division to be made and properly marked out, or otherwise defined; and (3) one that the defenders should be ordained to execute all deeds necessary to complete the titles of the parties to their respective portions. The action is conducted like an ordinary action. All the proprietors must be called, and if they do not agree on a scheme of division, a remit must be made to a practical man to prepare one. The parties, after being allowed to lodge objections and answers, if they think fit, are then heard upon the scheme, after which decree of division is pronounced. The decree can be recorded in the Register of Sasines, under the Conveyancing Act of 1874, which gives to it the effect of a conveyance,<sup>(g)</sup> and in this way it may often be unnecessary to take any steps under the conclusion of the petition for ordaining the parties to execute the deeds necessary to complete the titles. From many causes it is, however, so difficult as a rule to divide joint property equitably, or without causing great loss, that the action is almost always combined with a conclusion for sale, forming the action known as one of division and sale.

**3. Division and Sale.**—This action (competent likewise within the limit of value above explained) resembles the

<sup>(f)</sup> *Juridical Styles*, 2nd ed., vol. iii.  
p. 145.

<sup>(g)</sup> 37 & 38 Vict. c. 94, § 35.

action of division; but it proceeds upon the narrative that the subjects are such that an actual division is either impossible, or would be attended with great loss, and it prays for a judicial sale of them and for a division of the proceeds. The essential conclusions seem to be—(1) one for declarator that the subjects should be sold and the price divided; (2) one praying the Court to direct these things to be done; and (3) one praying that the parties should be ordained to execute the deeds necessary to complete the purchaser's title. If the defenders appear and admit that the sale should take place, the requisite orders would be pronounced at once; but if they should not appear, proof should be led to show the expediency of that course—that is, to show that the subject either cannot be divided at all, or only with great loss.<sup>(h)</sup> It is usual to appoint some person to draw up or revise the articles of roup, and to appoint the sale to be carried out at his sight. The interlocutor authorising the sale should provide for reasonable notice by advertisement or otherwise; and a clause authorising any one of the parties to the action to purchase is often inserted.

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(h) Bell's *Lectures on Conveyancing*, Practice, vol. ii. p. 307; *Juridical* 3rd ed., p. 831; *Bryden v. Gibson*, Styles, 2nd ed., vol. iii. p. 147. 4th Feb. 1837, 15 S. 486; *Mackay's*

### Section VIII.—PROCEEDINGS CONCERNING ECCLESIASTICAL BUILDINGS AND GLEBES.

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| <p>1. <i>Ecclesiastical Buildings and Glebes Act, 1868.</i></p> <p>2. <i>How Proceedings removed from the Presbytery.</i></p> | <p>3. <i>Conduct of Proceedings in Sheriff Court.</i></p> <p>4. <i>Appeal from the Sheriff.</i></p> |
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**1. Ecclesiastical Buildings and Glebes Act, 1868.**—By the Ecclesiastical Buildings and Glebes Act of 1868 certain proceedings which were formerly commenced and concluded in the Presbyteries of the Established Church of Scotland can now be removed from those tribunals to the Court of the Sheriff at any time that any of the interested parties becomes dissatisfied with their determination.

The proceedings in question are those relating to the building, rebuilding, repairing, adding to, or making other alterations on churches or manses, or to the designing or exchanging of sites for those buildings, or of glebes, or of additions to glebes, or of sites for churchyards, or additions to churchyards, and proceedings relating to the suitable maintenance of all such subjects, specially including the building or repairing of churchyard walls.(a)

**2. How Proceedings Removed from the Presbytery.**—The proceedings are to be begun before the Presbytery in the manner hitherto in use ; but upon any order, finding, judgment, interlocutor, or decree being pronounced by the Presby-

(a) 31 & 32 Vict. c. 96. Even though the order complained of be pronounced by the Presbytery incidentally in an incompetent proceeding, an appeal

under this Act is the appropriate means of seeking redress ; *Heritors of Pitligg v. Gregor*, 18th June, 1879, 6 R. 1063.

tery with which the minister of the parish, or any heritor, shall be dissatisfied, he may appeal the whole cause within twenty days from the date of the deliverance.(b) If the appeal be not taken within the proper time, the proceedings are final, unless, indeed, the Presbytery have been guilty of "a serious violation of the ordinary rules" for the administration of justice, "whereby iniquity or injustice has resulted."(c)

The appeal is taken by presenting a summary petition (which may be in the ordinary form) to the Sheriff of the county in which the parish is situated, praying him to stay the proceedings before the Presbytery, and to dispose of the same himself. If the parish is in more than one county, the petition may be presented to and disposed of by the Sheriff of either.(d)

The petition is to be intimated, within ten days of presentation, to the heritors and their clerk, to the minister of the parish, and to the Clerk of the Presbytery, by circular, in the manner provided for in the statute.(e) This intimation is to be made by the petitioner's agent without any special order; but the Sheriff must satisfy himself that it has been duly made, and if he discover any defect he must cause it to be remedied.(f)

When the appeal is duly made and insisted in,(g) it has the effect of staying any further progress before the Presbytery, and the proceedings must be concluded before the Sheriff Court, or (under appeal from it) by the Lord Ordinary. On

(b) Act, § 3.

(c) *Walker v. Arbroath Presbytery*,  
1st March, 1876, 3 R. 498.

(d) Act, § 4.

(e) Act, § 5. If the heritors exceed forty, notice on the church door and advertisement may be substituted for

the circulars to them.

(f) Act, § 6.

(g) If the original appellant do not insist in the appeal, the minister, or any heritor, or the heritors' clerk, or the Presbytery clerk, may insist on it. Act, § 3.

the appeal being intimated, the Presbytery clerk will have to transmit to the Sheriff-Clerk the previous proceedings, in the same way as any other Court would have to do on an appeal being taken from it. Of the references to the proceedings contained in minute books or other books belonging to the Presbytery, the appellant will have to produce certified copies.

**3. Conduct of Proceedings in Sheriff Court.**—The Sheriff's first duty in the petition is to inquire into the circumstances, and hear the parties or their agents. This he is to do without written pleadings, unless he sees fit specially to order them. He is to take a note of the proceedings, and of any evidence which may be led before him, and then he is to dispose of the petition as shall be just.<sup>(h)</sup> In addition to the general regulations, of which the substance has here been given, the Act contains special regulations as to how the inquiry is to be made in each of the several kinds of proceedings with which the Act deals, but these it would be needless to repeat here. The Sheriff may dispose of all questions of expenses.<sup>(i)</sup>

**4. Appeal from the Sheriff.**—All deliverances by the Sheriff are final and conclusive, and not subject to review, unless an appeal shall be taken to the Lord Ordinary. As there is no appeal except that given by the statute, there is none to the Inner House of the Court of Session,<sup>(j)</sup> and upon the same principle there will be no appeal from the Sheriff-Substitute to the principal Sheriff.<sup>(k)</sup> The statutory appeal from the Sheriff to the Lord Ordinary may be written on the end or margin of the deliverance, or be contained in a

(h) Act, §§ 7 and 8.

(i) Act, § 15.

(j) *Heritors of Pitaligo v. Gregor*, 18th June, 1879, 6 R. 1062. For excess of

jurisdiction the Court of Session might quash; *Reid v. Arbroath Presbytery*, 18th March, 1883, 20 S. L. R. 499,

(k) *Supra*, p. 375.

separate note, duly signed by the appellant or his agent, and dated.(l) It must be taken within twenty days of the date of the deliverance;(m) and the Sheriff-Clerk must, within two days of the appeal being taken, give notice to the respondent, and transmit the process to the Depute-Clerk of Session.(n) The effect of an appeal is to transfer the whole cause to the Lord Ordinary, and to give him the full powers which the Sheriff could have exercised, in so far as those are not limited by deliverances which have become final. Counter appeals are unnecessary, and any party interested may insist in an appeal if the original appellant withdraw.(o) The appeal appears to have the effect of removing the action entirely to the Lord Ordinary, and of requiring the proceedings to be carried on before him to their termination.

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Section IX.—PROCEEDINGS BETWEEN EMPLOYERS AND WORKMEN.

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| 1. <i>Employers and Workmen Act</i> ,<br>1875. | 3. <i>Small-Debt Court (Workmen)</i> .     |
| 2. <i>Ordinary Court (Workmen)</i> .           | 4. <i>Small-Debt Court (Apprentices)</i> . |
|  | 5. <i>Employers Liability Act</i> , 1880.  |

When the first edition of this work was published in 1869 there was in use in the Sheriff Courts a form of civil proceeding at common law by which a master could sue a servant for specific implement of a contract of service, and could, in the event of the servant's failure to obey the decree, imprison him. The second edition of this work was published so soon after

(l) Act, § 16.

(n) Act, § 19.

(m) Act, § 17. During this time  
extract is incompetent.

(o) Act, §§ 18 and 20.

the passing of the Employers and Workmen Act of 1875, that there was no time for the pronouncing of any decision, or the establishment of any practice, to interpret its terms. I accordingly retained in it the account of the old common law proceeding, but added my opinion that it was practically superseded by the new statute, and was so alien to its spirit, that although not expressly prohibited, further resort to it was unsafe. Subsequent practice has amply confirmed this view, and although the opportunity has thus been wanting for the Supreme Court to give an opinion upon it, Lord Fraser, who is an eminent authority, has pronounced against the competency.<sup>(a)</sup> I accordingly omit the common law proceeding from this edition, and give only those special proceedings between masters and workmen which are authorised by statute.

**1. Employers and Workmen Act, 1875.**—The proceedings between master and servant or apprentices being actions founded on contract, are in general actions of the ordinary kind, but in certain cases the powers of the Sheriff in dealing with them have been considerably enlarged by the Employers and Workmen Act of 1875. This Act may be popularly described as an Act for giving to the Sheriffs in the cases to which it applies the power of arbiters, so that they may, in the particular case before them, settle (according to law) the whole dispute between the parties. The Act makes no change in the ordinary forms of process, except indirectly where it may be necessary to take some additional step in order to give effect to its provisions. As the Act is one of a civil nature and of a remedial description, it would appear unnecessary for either party to set it forth or plead it specially. It would seem to be for the Court to apply it to the cases which fall

(a) Third edition of *Master and Servant*, p. 374.

under it, without its being expressly founded on by either party.(b)

**2. Ordinary Court (Workmen).—**The Act applies to all proceedings before the Sheriff's ordinary Court in relation to any dispute between an employer and a workman, arising out of or incidental to their relation as such (§§ 3 and 14). The expression "workman," however, is used in the Act in a limited meaning. It does not include seamen (§ 13), who are left to be dealt with under the Merchant Shipping Acts, under which the proceedings are more of a penal character. Neither does it include domestic or menial servants, who are left to the common law. It includes "any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer." The contract may be "express or implied, oral or in writing," it may "be a contract of service or a contract personally to execute any work or labour" (§ 10).

When there is a dispute in the ordinary Court, to which the Act applies, the powers of the Court extend to the three following particulars (more fully explained in the Act itself):—It may adjust and set off all claims and counter claims, whether liquid or illiquid; (2) it may rescind the contract, apportion wages, and award damages; and (3) in place of giving damages, it may, if both parties be willing, accept security for the performance of the contract (§ 3).

In the ordinary Court, there being no alteration made on the ordinary forms of process, the proceedings commence by petition, according to the common practice. There will be a

(b) 33 & 39 Vict. c. 90.



record and proof as usual, and the powers of appeal will remain unaltered.

**3. Small-Debt Court (Workmen).—**The Act applies to disputes between employers and workmen brought in the Small-Debt Court, where the sum claimed does not exceed £10. In such actions the Sheriff may exercise the powers conferred by the Act on him for the ordinary Court, provided that he do not make any order for the payment of any sum exceeding £10 (exclusive of costs), and shall not require security for any larger sum (§ 4). The proceedings will, as at present, commence in general by summons, and be entered like other small-debt actions in the book kept for recording them. No notice is required of any claim of set off, or counter claim.(c) The Act authorises the Sheriff to pronounce in the Small-Debt Court all orders necessary for carrying its provisions out (§ 14), and there is no review of his decision.(d)

**4 Small-Debt Court (Apprentices).—**The apprentices to whom the Act applies are those apprenticed to the business of workman (as defined by it) upon whose binding either no premium at all or a premium less than £25 has been paid.(e) It also applies to apprentices bound under the provisions of the Acts relating to the relief of the poor (§ 12). It does not apply to apprentices to sea service (§ 13).

All disputes between apprentices to whom the Act applies, and their masters, arising out of or incidental to their relation as such, may be heard and determined in the Small-Debt Court (§§ 5 and 14). In such disputes the Sheriff has the same

(c) A. S., 29th Jan. 1876.

(d) *Wilson v. Glasgow Tramway Co.*,  
22nd June, 1878, 5 R. 981.

(e) It seems to be implied that the  
contract of apprenticeship must be  
written.

powers as if the dispute were between employer and workman, and has, in addition to them, the following powers:—(1) To order the apprentice to perform his duties during the apprenticeship; and (2) when he rescinds the contract, to order the whole or any part of the premium to be paid back. If the apprentice do not fulfil an order to perform his duties, he may, on the lapse of not less than a month from its date, be ordered to be imprisoned for a period not exceeding fourteen days. The order and imprisonment may apparently be renewed from time to time (§ 6). If there be a cautioner for the apprentice, he may be summoned to attend the hearing, and ordered to pay damages not exceeding the limit (if any) to which he is liable under his bond (§ 7). When the apprentice fails to appear in England, he may be apprehended under the "Summary Jurisdiction Act" (11 & 12 Vict. c. 43), and power to issue a warrant to the same effect is conferred on the Sheriff in the Small-Debt Court (§§ 9 and 14).

The Small-Debt Court has its usual power of directing any payment to be made by instalments, but it has (in addition) a power to rescind or vary the order from time to time. As the Act (§ 9) is worded, it would look as if the Sheriff had power to cancel the order altogether, but it is probably only meant that he should have power to alter the part relating to the instalments. (f)

**5. Employers Liability Act, 1880.**—In actions brought under the Employers Liability Act of 1880, there are provisions as to the jurisdiction of the Sheriff Court so peculiar

(f) Forms for these various proceedings will be found in the A. S., 29th January, 1876, but in using them now it must be remembered that while imprisonment for not obeying an order to

fulfil a contract may still be competent, as being under a decree *ad factum prestandum*, imprisonment for failure to pay any sum of money will now be incompetent (43 & 44 Vict. c. 34, § 4).

as to require notice. By that Act it is provided that in certain cases (defined in it) where personal injury is caused to a workman, and where the workman, or his personal representatives, shall give notice within six weeks, and shall raise in the Sheriff Court, within six months in the case of a lesser injury, or within twelve months after death, in the case of its happening, an action for damages; then the pursuer shall—(1) have “the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work;” and (2) may recover a sum not exceeding the equivalent of the estimated earnings of a workman of the same grade during the three years preceding the injury.(g) This Act is therefore one which—(1) makes a certain defence no longer available to the employer in certain cases; and (2) limits the amount of damages which may be awarded when that happens. It would appear, therefore, that the defence in question is still available in all actions commenced in the Court of Session, and—to the effect of preventing an award of more than three years’ earnings—in all actions whatever. As the effect of the statute is in the first place to exclude a defence, it would appear that it ought to be pleaded in the petition, and this has been the idea of the Legislature, as there are more than one reference in the Act to actions brought “under” it. The practitioner, in any view, would do well not to omit founding on the Act, as the penalty of omission may be serious in an action which must be brought within a limited time. When brought in the Sheriff Court, the action may be removed to the Court of Session, not only in the ordinary way (for jury trial), when it sues for more than £40; but also under the Act of 1877, (apparently) what-

(g) 43 & 44 Vict. c. 42, §§ 1, 3, and 4.

ever be the value at stake.(h) The mode of removing actions under the last-named Act has already been explained.(i) In any case when the action reaches the Court of Session, it must be tried by jury, unless the parties consent, or special cause to the contrary be shown.(j) In the Sheriff Courts there is a power to call in assessors to fix the amount of compensation; but it has remained inoperative from want of machinery to carry it out.

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Section X.—PROCEEDINGS WITH REFERENCE TO ENTAILED ESTATES.

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| 1. <i>What Proceedings competent.</i>           | 7. <i>Charters, &amp;c., to be Recorded.</i>  |
| 2. <i>Feuing under Act of 1868.</i>             | 8. <i>Feuing under Acts of 1840 and 1882.</i> |
| 3. <i>Conditions on which Feuing competent.</i> | 9. <i>Leasing Entailed Lands.</i>             |
| 4. <i>What Lands may be Feued.</i>              | 10. <i>Petitions concerning Improvements.</i> |
| 5. <i>What Authority to Feu obtained.</i>       | 11. <i>Exchange of Entailed Lands.</i>        |
| 6. <i>Appeal from Sheriff's Decree.</i>         |   |

**1. What Proceedings competent.**—Several proceedings with reference to entailed properties are competent in the Sheriff Court. Among these are petitions for authority—(1) to feu for building purposes under the Act, 1868;(a) (2) to feu for churches, schools, and other purposes under the Act of 1840, and for scientific purposes under the Act of 1882;(b) (3) to lease under any of the Entail Acts;(c) (4) to charge with improve-

(h) 43 & 44 Vict. c. 42, § 6 (1 and 3)  
 Morrison v. Baird, 2nd Dec. 1882, 10 R. 271.

(i) *Supra*, p. 406.

(j) M'Avoy v. Young's Paraffin Co.,

5th Nov. 1881, 9 R. 100.

(a) *Infra*, articles 2 to 7.

(b) *Infra*, art. 8.

(c) *Infra*, art. 9.

ment expenditure of all kinds; (d) and (5) to excamb portions under 300 acres in extent. (e) Petitions to entail, or disentail; to sell; to charge with provisions or debts for other than improvement purposes; and to uplift, and apply, or acquire consigned money, or money held in trust; are incompetent.

**2. Feuing under Act of 1868.**—The Entail Amendment Act of 1868, (f) gives power to heirs of entail in possession to grant building feus, or dispositions under reservation of a ground-annual, of certain parts of the entailed estates. The power may be exercised notwithstanding any prohibitions or limitations in the deed of entail, or in any Act of Parliament. If granted to the heir in possession the power is available to any succeeding heir, (g) but there is a doubt whether the application can be made in the Sheriff Court in the case where the heir in possession is a minor, or subject to a legal incapacity. (h)

**3. Conditions on which Feuing competent.**—Subject to the limitations afterwards explained, any entailed lands may be feued, but it is only when the estate is held by burgage tenure that dispositions on payment of a ground-annual are competent. The annual payment in every case must be fair and adequate, and no grassum, fine, or consideration of any kind, except the annual payments, must be taken. Under the Conveyancing Act of 1874, even the nominal casualty of one penny on the entry of an heir or singular successor which the

(d) *Infra*, art. 10.

(e) *Infra*, art. 11.

(f) 31 & 32 Vict. 84, § 3, 4 & 5.

(g) 45 & 46 Vict. c. 53, § 6 (3).

(h) *Ibid.* § 11; and note at page 16

of the very excellent and useful edition of the Act of 1882 by Mr. John Philip Wood, W.S. In certain circumstances a factor *loco absentis* may apply; see Act of 1882, § 14.

Act of 1868 permitted, cannot now be exacted.(i) The contract (whether feu-charter, lease, or disposition) must contain such conditions as the Sheriff thinks essential for securing the annual payment, and a condition that buildings of the annual value of at least double the annual payment be erected within five years of its date, and thereafter kept in good, tenantable, and sufficient repair.(j) The contract must also contain any other conditions to which the Sheriff may see fit to subject it. The Act declares that if any fine be taken, or that if buildings be not erected and kept in repair as required, the contract shall be null and void.(k)

**4. What Lands may be Feued.**—The lands thus to be feued, or disposed, may consist of any part of the entailed estate, excepting the garden, orchards, policies, or enclosures adjacent to or in connection with the manor place, in so far as such garden, orchards, policies, or enclosures are necessary to the amenity of the manor place. Minerals, and the right of working the same, are specially reserved from the power to feu or dispose; and under leases the law would reserve them.

**5. How Authority to Feu obtained.**—The authority to feu, or dispose in this way, is obtained by the heir in possession presenting an application to the Sheriff of the county within which the entailed estate, or the part proposed to be dealt with, is situated. No form for this petition is prescribed, but it will be safest to present it in that prescribed by the Act of 1876.(l) The condescendence will naturally refer to the Act,

(i) 37 & 38 Vict. c. 94, § 23.

equivalent; *Stewart v. Murdoch*, 27th Jan. 1882, 9 R. 458.

(j) The stipulation must be for buildings to be hereafter erected, as buildings already erected cannot be taken as

(k) 31 & 32 Vict. c. 84, §§ 3, 4, and 5.

(l) *Supra*, p. 370.

and then set forth the lands that are proposed to be dealt with, the petitioner's title to them, the name and designation of the next heir, the conditions on which it is proposed to feu or dispone, and the annual payment that it is proposed to exact. The prayer may be—(1) for an order to intimate to the next heir, (2) for a remit to persons of skill (whose names should *not* be suggested) to examine and report, and (3) for authority to feu or dispone (taking the words from the Act, and using the alternative desired) the specified lands on the conditions set forth. Notice of this application must be given to the next heir of entail in such manner as the Sheriff shall deem proper. If the next heir be under age, or subject to any legal incapacity, the Sheriff is to appoint a tutor or curator *ad litem* to attend to his interests. As the interest of the next heir may be opposed to that of the petitioner, care should be taken not to appoint any one to the office who is suggested by, or far less, connected with, him or his agents.(m) The next step is to remit to one or more skilled persons to inquire and report—(1) as to the value of the lands proposed to be dealt with, and (2) whether, from their position or otherwise, they may or ought to be so dealt with in terms of the Act, either in whole or in lots. On the skilled persons reporting that the annual payment proposed is in their opinion (having regard to all the circumstances) fair and adequate, and that the lands may from their position be dealt with in terms of the Act, either in whole or in lots, the Sheriff, on consideration of the whole circumstances, may grant the required authority. The Sheriff's deliverance will authorise the heir in possession, or his successors in the entailed estate, at any time within ten years from its date, to feu or dispone the land in one or more lots, at such rate of annual payment

(m) See Stewart, *supra* note (j).

as can be obtained, not being less than the rate fixed by the reporters. The deliverance must specially subject the right to feu or dispone to the conditions which the Sheriff thinks essential for securing the annual payment; and should he see fit to subject it to other conditions, the deliverance must set them forth. The deliverance will conclude by giving authority to grant all the necessary feu-charters or dispositions. Sometimes a model feu-charter is approved of, and in any event it seems clear that the petition gives a continuing power, and that it is unnecessary, during the ten years which it lasts, to come back to the Sheriff on each time of its exercise for the approval of the particular bargain.

**6. Appeal from Sheriff's Decree.**—The decree of the Sheriff is not liable to review except by note of appeal to be presented to the Court of Session, in one or other of the Divisions thereof, to be disposed of there as a summary cause. This note of appeal must be lodged with the clerk of the Division, and written notice of it must be given to the opposite party, or his known agent, or lodged with the Sheriff-Clerk, within six months of the date of the decree, otherwise the decree will be final and conclusive. In the event of an appeal, the judgment of the Court of Session is final and conclusive.

**7. Charters, &c., to be Recorded.**—The feu-charter or disposition, on being executed, must be recorded in the Register of Sasines, and from that date will be effectual to all intents and purposes, taking the lands conveyed (so long as it remains in force) out of the entail, and (in lieu thereof) leaving under the entail the superiority of the lands and the annual payment.



**8. Feuing under Acts of 1840 and 1882.**—The powers to feu, lease, or dispose, contained in the Entail Amendment Act of 1868, not being hampered with any conditions as to the purposes for which the proposed buildings are intended, will nearly supersede any statutes giving powers to feu for special purposes, although these statutes also allow of proceedings in the Sheriff Court, and are sometimes useful. For example, the Act of 1840 (3 & 4 Vict. c. 48, § 1) provides for feuing lands, with the authority of the Sheriff, for places of public Christian worship, schools, burying-grounds, play-grounds, and dwelling-houses and gardens for ministers and schoolmasters, for such feu-duty as may be agreed on; but as the proceedings are not often necessary, and are fully explained in the Act, it seems sufficient here simply to refer to it. Again, under the Act of 1882, a power has been given to feu a portion of land, not exceeding two acres in extent, for a scientific purpose, or other purpose of public utility.<sup>(n)</sup> The conditions are given in that Act, and the procedure is taken under the Act of 1868.

**9. Leasing Entailed Lands.**—The Act of 1868 gives authority to the Sheriff to authorise leases for ninety-nine years in the same way and under the same conditions as it authorises him to sanction feus; and the powers of the Act of 1840 and of the Act of 1882, just quoted, also deal with leases; but under the latter Act a general power is given to make in the Sheriff Court any application whatever for authority to grant leases which is competent under any of the Entail Acts.<sup>(o)</sup>

As the heir in possession may let any part of the lands at a fair rent for any period not exceeding twenty-one years, and

(n) 45 & 46 Vict. c. 53, § 6 (2).

(o) 45 & 46 Vict. c. 53, § 6.

may let minerals for any period not exceeding thirty-one years, without other authority than his own, the general power thus given by the Act of 1882 must apply to leases of extraordinary duration. The leases thus dealt with would appear to be those competent under the Montgomery Act for building purposes,<sup>(p)</sup> and those under the Rutherford Act.<sup>(q)</sup> All applications brought under this provision are to be made and disposed of, as nearly as may be, in the same way as if they were applications to the Sheriff for authority to feu under the Act of 1868, and the provisions as to appeal are the same.<sup>(r)</sup>

**10. Petitions concerning Improvements.**—Till 1882, the only provisions in regard to constituting the cost of improvements as a charge against an entailed estate, which were applicable to the Sheriff Court, were those contained in the Montgomery Act of 1770. That procedure has been superseded. The Entail Act of 1882 has made competent in the Sheriff Court applications for charging improvements under the Entail Act of 1875, as amended by the Entail Act of 1878. These provisions, which apply both to old and new entails, are far preferable to those of the Montgomery Act, in as much as they include every kind of permanent improvement; are not limited to any particular number of years' rent; and are applicable to prospective as well as past expenditure.<sup>(s)</sup> Applications under the Acts of 1875 and 1878 for authority to borrow and charge for improvement expenditure, are to be

(p) 10 Geo. III., c. 51, §§ 4 and 5. The land must not exceed five acres.

(q) 11 & 12 Vict. c. 36. The whole land leased or feued under this power must not exceed one-eighth in value of the estate.

(r) 45 & 46 Vict. c. 53, § 5. In this Act it may be noted that it is specially

provided that there is to be no appeal from Sheriff-Substitute to principal Sheriff, while in the Act of 1868 this is left to inference.

(s) 45 & 46 Vict. c. 53, § 5; 38 & 39 Vict. c. 61, §§ 7 and 8; 41 & 42 Vict. c. 28, §§ 3 and 4.

made as nearly as possible, in so far as concerns the procedure with regard to notice and inquiry, in the same way as applications for authority to feu under the Act of 1868.(t)

If the improvements have been already made, the Sheriff must be satisfied that they are of a substantial nature and beneficial to the estate (as at the date of the application) to at least the extent of the sum authorised to be borrowed. The amount of the expenditure must be instructed by such evidence as the Sheriff deems reasonable. The vouchers, however, need not be produced in court, though the Sheriff or reporter appointed to inquire into the facts and examine the improvements, may call for them, if he think fit. In fixing the amount to be borrowed, the cost of the application and proceedings, and of obtaining the loan and granting security are included. The proceedings in the case of past expenditure terminate with the granting of the authority.(u)

In the case of improvements not yet executed, the Sheriff, upon being satisfied that they will be, when executed, of a substantial nature and beneficial to the estate, determines (upon the estimate of one or more persons of skill) the amount to be borrowed. He then grants the authority, but provides for the money being paid by the lender into a bank, there to lie consigned, on a receipt payable to the orders of the Court, and to be drawn out from time to time to meet the expenditure. The Sheriff makes orders for the due inspection of the works, and for the payment of them, in so far as they have been executed satisfactorily.(v)

The amount which may be borrowed is the same in either case. The whole sum expended may be borrowed, if the borrower can make an agreement to repay it by an annual

(t) 1882 Act, § 5.

(v) 1875 Act, § 7.

(u) 1875 Act, § 7.

rent during a period not exceeding twenty-five years, and at a rate of interest not exceeding £7, 2s. per cent.(w) If this agreement is not made, three-fourths of the amount may be borrowed upon bond and disposition in security.(x)

**11. Exchange of Entailed Lands.**—The proprietors of entailed estates may make exchanges of small parcels of their lands with the neighbouring proprietors. The quantity must not exceed 300 acres of land, lying together in one place or plot;(y) and an equivalent in land contiguous to the entailed estate must be received in exchange. The value of the land is ascertained on the proprietor of the entailed estate presenting an application for that purpose to the Sheriff of the county where the estate is situated. On this application the Sheriff appoints two or more skilled persons to inspect the lands and settle the marches thereof, and to report, upon oath, whether the exchange will be just and equal. On their reporting that it is, the Sheriff authorises the exchange to be made by contract of excambion; and on the same being executed and recorded in the Sheriff Court Books within three months of the execution, the land added to the entailed estate becomes subject to the entail, and the land given off free from the entail.(z)

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#### Section XI.—ACTION OF EXHIBITION.

The action of exhibition is the special name given to an action when what is wanted is that a deed or other writing be

(w) 1875 Act, § 8.

(y) 31 & 32 Vict. c. 84, § 14.

(x) 1882 Act, § 6, subsec. (1).

(z) 10 Geo. III. c. 51, §§ 32 and 33.

exhibited or delivered up. It is conducted in all respects like an ordinary action *ad factum præstandum*. Sometimes a special form of it is used, when the delivery is wanted, in the first place at all events, only for the purpose of examining the writs; as when an heir wants to inspect the writings belonging to his ancestor, with the view of seeing whether he should take up the succession. When the Sheriff is satisfied that the writs should be produced, the regular and proper course is that they should be exhibited in the hands of the Clerk of Court.<sup>(a)</sup> Sometimes the action contains a conclusion that a copy of the writs be made and authenticated at the sight of the Court, in which case it is called an action of transumpt. The action is competent in the Sheriff Court though the deed relate to an heritable right, provided that the pleas raise no question of heritable title.<sup>(b)</sup>

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## Section XII.—JUDICIAL FACTORS.

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|-------------------------------------|-------------------------------------|
| 1. <i>Common Law Jurisdiction.</i>  | 9. <i>Service and Intimation.</i>   |
| 2. <i>Statutory Jurisdiction.</i>   | 10. <i>Procedure in Absence.</i>    |
| 3. <i>What Factors Competent.</i>   | 11. <i>Answers.</i>                 |
| 4. <i>On what Estates.</i>          | 12. <i>Inquiry.</i>                 |
| 5. <i>Petition for Appointment.</i> | 13. <i>Nomination and Caution.</i>  |
| 6. <i>Pursuers and Defenders.</i>   | 14. <i>Duties of Factor.</i>        |
| 7. <i>Where Petition Presented.</i> | 15. <i>Incidental Applications.</i> |
| 8. <i>Procedure.</i>                | 16. <i>Appeals.</i>                 |

**1. Common Law Jurisdiction.**—The power of appointing factors for the management of the estates of those persons who are themselves incapacitated to manage them is not one which is believed to be vested at common law in the Sheriff Courts.

(a) *Clark v. Melville*, 16th Nov. 1880, 8 R. 81.

(b) *Burnet v. Morrow*, 19th March, 1864, 2 M. 929.

The power has long been exercised in the Court of Session, and there it is said to be possessed by virtue of that somewhat indefinite attribute called the "*nobile officium*," which is said to belong to its judges, but to no other judges in Scotland. Be its origin what it may, the established practice is conclusive, and there is neither any usage in the Sheriff Courts which at common law would authorise the appointment of judicial factors, nor any machinery for regulating their functions if they were appointed. It is said that there has been something of a practice in Lanarkshire of appointing factors, but it can hardly have been extensive there, otherwise it would have come, at some time or other, under the review of the Supreme Court, and it certainly is not a practice elsewhere, because (to my knowledge) there are large and important sherifffdoms where it is unknown. The only power of appointing factors in the Sheriff Courts which is known in practice is that of appointing them where it is necessary for the extrication of some part of their other jurisdiction. Under the same general powers which entitle them to appoint tutors and curators *ad litem*, they sometimes appoint factors (or, without using the name, make remits to persons) to take charge of property during the course of a litigation in which it is involved.(a) This power, however, is exercised in the action in question, and only as incidental to it. If the appointment of the factor were the main matter, and the other conclusions were brought only to give a colour to the appearance of jurisdiction, the authority would not exist.(b) It is on the same principle that in executry petitions the Sheriff sometimes appoints factors. Where, for example, a minor or pupil is entitled to the office of executor, and is unable to exercise it on account of his

(a) *Drysdale v. Lawson*, 11th March, 1842, 4 D. 1061.

(b) *Rowe v. Rowe*, 4th June, 1872, 9 S. L. R., 492.

youth, the Sheriff Court will allow him to act through a factor, on whom it will confer the office of executor. But this, it will be seen, is done simply in order that the ordinary jurisdiction of the Sheriff Court may be extricated. There is also a power of appointing judicial factors under the Bankruptcy Statutes, but that was under special statutory authority and besides does not belong to this treatise. Such were the powers of the Sheriff Courts in this matter prior to the Judicial Factors Act of 1880.(c)

**2. Statutory Jurisdiction.**—The Judicial Factors Act of 1880(d) confers on the Sheriff Courts a jurisdiction which is limited both as regards the kinds of factors who may be appointed, and the amount of property which they may look after.

The powers given by the Act of 1880 are exercised under it when taken in conjunction with other Acts of Parliament and Sederunt. Of these the more important are — the Act of Sederunt of 14th January, 1881, passed in pursuance of the Act of 1880; the Pupils Protection Act of 1849,(e) the greater part of which is virtually incorporated in the Act of 1881; the Act of Sederunt of 1st February, 1850, regulating the fees payable; and the Court of Session Act of 1857,(f) which is the one regulating the right of appeal. In addition to these, there are the regulations issued by the Accountant of the Court of Session for the guidance of factors in performing their duties.(g) Here, as in other departments

(c) In regard to this, and all other matters connected with judicial factors, the reader will find much useful information in Mr. Hugh J. E. Fraser's very excellent edition of Mr. Thoms' treatise on the subject.

(d) 43 & 44 Vict. c. 4.

(e) 12 & 13 Vict. c. 51.

(f) 20 & 21 Vict. c. 56.

(g) These regulations, and the A. S. of 14th January, 1881, make the A. S. of 25th November, 1857, of little use in the Sheriff Courts.

of Sheriff Court practice, the practitioner looks in vain for any one Act containing all the regulations on any one subject.

**3. What Factors competent.**—There are only two kinds of judicial factors who may be appointed in the Sheriff Court, namely, those who act *loco tutoris*, and those who act under the name of *curator bonis*. The former take charge of the property of pupils, and the latter of that of insane persons.<sup>(h)</sup> The Act does not confer on the Sheriff the power of appointing to the somewhat anomalous office of *curator bonis* to a minor who is above pupillarity.<sup>(i)</sup> This power has doubtless been left out intentionally,—partly because its character was anomalous, and partly because curators, with the ordinary powers, may be chosen by the minor in the Sheriff Court. Why the other classes of judicial factors were left out is not so clear, but there is at any rate no doubt about the fact, that however insignificant the property concerned may be, there is no power given by the Act to appoint—factors (1) *loco absentis*, or (2) to persons incapacitated from other causes than insanity, or (3) on trust-estates, or (4) in partnerships.

**4. On what Estates.**—The pecuniary limit to the Sheriff's jurisdiction is that he must not appoint judicial factors where the estate of the ward exceeds in yearly value £100.<sup>(j)</sup> The whole of the ward's estate taken together must not exceed this yearly value, and "estate" is defined as including "all property and funds, and all rights heritable and moveable."<sup>(k)</sup> The yearly value of heritable property is to be taken from the Valuation Roll in force for the time being, that is (it is

(h) Act of 1880, § 3.

(i) This is clear from § 4 (1) which says the application must be made where the "pupil" is resident. The

word "pupil" cannot include a minor who is above pupillarity.

(j) Act of 1880, § 4.

(k) *Ibid.* § 3.



presumed), in force at the time of disposing of the application. If the property be moveable, and consist of a value which can be estimated, the income is to be ascertained by taking interest on it at the rate of four per cent. per annum,—apparently whether the property be actually yielding more or less at the time. For heritable property not appearing on the valuation roll, no special provision is made, but there is a general provision which reaches it, as well as all other kinds of estates which cannot be ascertained in either of the foregoing manners. In all such cases the Sheriff is to ascertain the annual value in such manner as he shall think fit.<sup>(k)</sup> The Sheriff is to be satisfied by “reasonable evidence” as to the value, and then he is to insert in his interlocutor a finding on the point, which is to be final.<sup>(l)</sup> In so far as what has to be proved is positive, little difficulty occurs, as it is easy for the Sheriff to get an inventory of the ward’s estate so far as known, and to see that, when valued as the Act directs, it does not exceed the amount authorised. But in so far as regards the negative part of the proof—namely, the ascertaining that the ward has no other property—positive evidence cannot be forthcoming, and, generally, nothing else is to be had except a certificate by the petitioner’s agent that after due inquiry he has not discovered any more. It would seem very unnecessary to make the relatives appear in Court and take an oath to that effect.

All the real and personal property, wherever situated, would seem to require to be taken into account. As the ward’s residence fixes the Sheriff who has jurisdiction,<sup>(m)</sup> the fact

(k) Act of 1880, § 4 (2). The Act does not make it very plain, but it would be contrary to common sense if, in estimating the value of landed pro-

perty, heritable debts were not to be deducted.

(l) *Ibid.* § 4 (3).

(m) Act of 1880, § 4 (1).

that the property lies in other sheriffdoms in Scotland must be immaterial; and as the office of judicial factor is one which international law recognises,<sup>(n)</sup> the fact of the estate not being in Scotland at all would seem equally immaterial.

Where there are several wards who are in the same position—for example, several pupils in the same family—it is the property of each which must regulate the competency. Though, for convenience, the same petition and procedure may often be made in such cases to serve for the application, and though the same person may be appointed for all the wards, the offices conferred are truly separate. As each ward, moreover, will have only the property entitling him to the cheap procedure, there is no reason why he should be sent to the Court of Session merely because he has brothers or sisters as well or ill off as himself.

The Act does not give much light as to what is to happen if the pecuniary amount be by misadventure exceeded. If the Sheriff err, either from his own mistake or from wrong information, as to the original fixing of the amount, there is a provision which so far meets the case; for it is provided that no appointment once made shall fall in respect of it afterwards appearing that the yearly value did exceed £100.<sup>(o)</sup> But although this would doubtless protect all acts of the factor so long as he was in office, and also keep him safe so long as he was in ignorance of the error, can it prevent the Court of Session recalling the appointment when the error is discovered? or is the factor bound himself to take any step on its coming to his knowledge? Further, supposing the value to increase, what is to happen? It has been said, in a quarter entitled to respect, that if it increase above what was originally named,

<sup>(n)</sup> Thoms on Factors, by Fraser,      <sup>(o)</sup> Act of 1880, § 4 (3).  
237.

though it keep still within the limit, there ought to be a renewal of the appointment in the Sheriff Court ;(*p*) but this seems to me unnecessary. The jurisdiction is unaffected by this increase, and all that is required is to see that the caution is made applicable to the increased value. If the property increase till it stand above the amount at which there is jurisdiction, it is more difficult to say what should be done. If the Act of Parliament trusted that the Act of Sederunt would provide for such a case, that has not been done ; but doubtless, when any practical difficulty arises, the "*nobile officium*" will find a satisfactory way out of it.

**5. Petition for Appointment.**—The application is to be made by a petition in the ordinary form, (*q*) that is to say, by one containing prayer, condescendence, and pleas-in-law. The prayer will ask specifically for the appointment which is desired, namely, factor *loco tutoris*, or *curator bonis*, as the case may be. It is not desirable that it should ask generally for the appointment of "judicial factor," as there is a doubt about the competency of such an appointment. (*r*) There can be no difficulty about the condescendence. It must narrate the reasons why the appointment is desired, and should set forth the particulars of the estate, at all events with specification enough to show that it does not exceed the proper limit. The plea in law must be merely formal. (*s*)

(*p*) Thoms on Factors, by Fraser, p. 521.

(*q*) Act of 1880, § 4 (1).

(*r*) Thoms on Factors, by Fraser, p. 520; Accountant of Court *v.* Morison, 21st Feb. 1857, 19 D. 504.

(*s*) In the appendix to Thoms on Factors, p. 687, will be found a form of

petition. The form is ampler than is required by the Act of 1876, the schedules of which confine the prayer to the remedy wanted, without any crave for taking the steps of procedure by which it is to be reached. The forms given by Sheriff Lees (Sheriff Court Styles, p. 167) seem preferable.

**6. Pursuers and Defenders.**—The persons who may apply cannot be strictly defined. The application being one calling on the Court to help a person who is presumably helpless, the Court will interfere at the instance of almost any one. The nearest relatives on either side, or any one or more of them; friends who are interested; trustees; public authorities, such as parochial boards; even parties such as creditors whose interference is not disinterested, have all been known to apply in the Court of Session. Where one relative applies, the others equally or more near should be called as defenders; and in general all the next-of-kin should (if practicable) be made parties either on the one side or the other. As to those who should in general be called, or who may appear as defenders, all that can be said is that all the near relatives, and all who have any direct interest in the appointment, should in some shape get an opportunity of being heard, and that there is no rule which will prevent any one who has any kind of interest in the appointment, or who has anything to say for the ward's benefit, from being heard.

In the case of insane persons, they must always be called as parties to the petition, either by being made defenders and being personally served as such, or by having notice of the petition personally served on them, either at the petitioner's instance or on the proper order of the Sheriff. In some shape it is indispensable that the insane person have personal knowledge of what is proposed to be done with his property. (t) Pupils are not usually made parties.

**7. Where Petition Presented.**—The application is to be presented to the Sheriff within whose jurisdiction the pupil

(t) *M'Gregor*, 23rd Dec. 1848, 11 D. 285. Postal service on a lunatic would not be advisable.

or insane person resides.(u) This apparently is meant to signify the Sheriff of the ward's domicile, because neither a pupil nor an insane person can, strictly speaking, possess a residence. If the actual residence of the ward were to be taken, difficulties might arise where his residence was in one sheriffdom and his home in another; as, for example, where a pupil is at a boarding-school, or an insane person is in an asylum, in one jurisdiction, while his home is in another. It is conceived that it is the ward's home which is intended. If he have neither home nor residence, the application would have to be presented to the Court of Session.

**8. Procedure.**—The procedure in the petition, when presented, is to be summary,(v) and to be conducted as nearly as may be in the same way as a similar petition under the Pupils Protection Act, before a Lord Ordinary.(w) The first order is for service, intimation, and answers.

**9. Service and Intimation.**—The order for service appoints intimation on the walls of the Sheriff Court, and to the Accountant of the Court of Session, and service on the defenders. The latter (under the Act of Sederunt of 1881) may receive service by registered letter,—a provision which will now be sufficiently complied with by postal citation,(x) but it is doubtful whether this would apply in the case of service on an insane person, on whom personal service in the usual form seems advisable.(y) Where defenders are out of Scotland there will necessarily be edictal citation, though in this case the *induciae* will not be at the Sheriff's discretion, but will be fourteen days.(z) The intimation and service in all cases

(u) Act of 1880, § 4 (1).

(v) A. S., 14th Jan. 1881, § 1.

(w) Act of 1880, § 4 (1).

(x) A. S., 14th Jan. 1881, § 3.

(y) See *supra*, Art. 6.

(z) 39 & 40 Vict. c. 70, 9.

should be accompanied by service copies. Other intimation or service than that asked may be ordered by the Sheriff if he thinks right, and he may also order advertisement in the form prescribed. The first order likewise allows answers to be lodged within a certain period.(a)

**10. Procedure in Absence.**—If no answers are lodged, the petition is disposed of in absence, but after due inquiry, and not as a matter of course. There is a provision that a decree pronounced in absence is not to be opened up after twelve months.(b) This apparently implies that within the twelve months such a decree may be opened up. Probably a petition to the Sheriff for recall is therefore within that period competent. No other mode of review suggests itself, which would not either be very inconvenient or very expensive.

**11. Answers.**—Where answers are lodged, they will, as the petition contains an articulate condescendence, have also to be articulate. The Act of Sederunt seems to have assumed that leave to answer the pursuer's statement of facts will always be sufficient; but if a separate statement is indispensable, there is no reason why it should not be added. Answers may be lodged by any party entitled to defend, whether he have been specially called or not. It seems to be unnecessary to close a record, and not to be the practice in the Court of Session to have one, though, doubtless, there would be nothing incompetent in the step if the difficulty or importance of the questions raised were to justify it.

**12. Inquiry.**—The nature of the inquiry is very much left to the discretion of the Sheriff. The fact of pupillarity is usually assumed from the statement in the petition, but there

(a) A. S., 14th Jan. 1881, § 3.

(b) Act of 1880, § 4 (8).

must always be evidence in the case of insanity. The Sheriff, as already explained, must be satisfied as to the amount of the estate. He has also to be satisfied as to the fitness of the person to be appointed. It is no objection to this person that he be suggested by the applicant, provided he be a male, of age, of good character and circumstances, resident in Scotland, and not disqualified by having an interest opposite to that of the ward. There is an objection to the appointment of women, and of clergymen, especially those of the Established Church.(c)

As to the mode in which the inquiry is to be made, no general rules can be laid down, as it will depend so much on the facts to be ascertained. In very many cases the Sheriff will satisfy himself; in others he will make remits;(d) and in a few he may allow proof in common form.

**13. Nomination and Caution.**—When the appointment is made, it will, as already pointed out,(e) be in special terms to the office of factor *loco tutoris*, or *curator bonis*, as the case may be. The person appointed must find caution, and that within three weeks, unless another time has been specially fixed in the interlocutor.(f) If the caution be not found within that time, or within a time prorogated before its expiry, the appointment *ipso facto* falls. There seems, however, no incompetency in the Sheriff, if he thinks right, re-nominating the same person.

The mode of finding the caution is fully set forth in the Act of Sederunt of 1881 (§ 6), the terms of which it is unnecessary to repeat here. The bond of a guarantee society

(c) Thoms on Factors, by Fraser, p. 45 and p. 48.

(d) 20 & 21 Vict. c. 56, § 5.

(e) *Supra*, art. 5.

(f) A. S., 14th Jan. 1881, § 5.

may be accepted. Until caution has been found, the Sheriff-Clerk cannot issue extract,<sup>(g)</sup> and without it the factor cannot act. The petition, after extract, is not to be taken off the rolls, but remains (without falling asleep) for the purpose of having any further applications connected with the estate disposed of.<sup>(h)</sup>

**14. Duties of Factor.**—It is needless to give here in detail the duties of the factor. They are explained in the instructions for his guidance issued by the accountant. It is matter of statutory obligation that he place all sums over £25 in one of the chartered banks.<sup>(i)</sup> He is under the control of the accountant, by whom his accounts are audited, and who is bound to report anything irregular to the Sheriff, in the same way as in Court of Session appointments he reports to the Lord Ordinary.<sup>(j)</sup> If the cautioner dies, or fails, or if the premiums are not paid, the factor, or the Sheriff-Clerk, if he learn the fact, must report it to the accountant; and new caution must be exacted, or (failing it) a new factor appointed.<sup>(k)</sup>

**15. Incidental Applications.**—All incidental applications are made by note in the original petition.<sup>(l)</sup> Among these applications may be particularly mentioned those for special powers, for renewal, and for discharge. The provisions as to intimation and service of these are generally the same as those for the principal petition.

Special powers cannot be applied for till after extract, and when the factor requires them, he must first present his note to the accountant, and obtain from him a report upon their

(g) A. S., 14th Jan. 1881, § 7.

(h) *Ibid.* § 2.

(i) A. S., 14th Jan. 1881, § 11.

(j) Act of 1880, § 4 (5).

(k) A. S., 14th Jan. 1881, § 8.

(l) *Ibid.* § 2.



necessity and propriety. After that the note is presented to the Sheriff, along with the accountant's report, and after intimation and service, and such inquiry as may be necessary, the Sheriff deals with them. The usual cases where special powers are required by factors are where it is desired to sell heritable property or to borrow upon it, to feu, or to lease for periods enduring beyond a year after the expiry of their office, or for a reduced rent, and (in certain cases) to compromise or submit to reference.(m)

A renewal of the appointment to the office is requisite where the original nominee has died, or has gone abroad, or resigned, or in any way ceased to hold office. A renewal, and not the presentation of a new petition, seems the appropriate remedy in such cases; and as the intimation and service are the same, no risk can be incurred by following it.

The discharge is, in like manner, obtained by a note in process, which, after being intimated and served like the petition, is sent to the accountant for a report.(n) If the report is satisfactory, and the funds are all accounted for or put in safe custody, the discharge is granted and the bond of caution delivered up.

A note for recall may be presented in various circumstances which it is needless to enumerate; and as in most cases it will be a pure appeal to the discretion of the Sheriff, no general directions concerning it are possible. In all cases it may be presented to the Court of Session.(o)

**16. Appeals.**—The provision as to appeals is that they are to be competent from the Sheriff-Substitute to the principal Sheriff in the same way as appeals from the Lord Ordinary

(m) *Thoms on Factors*, by Fraser,  
p. 212 *et seq.*

(n) A. S., 14th Jan. 1881, § 10.

(o) Act of 1880, § 4 (9).

to the Inner House of the Court of Session.(p) This gives in every application, original or incidental, a right of appeal on the merits from the decision of the Sheriff-Substitute, where the application has been in the first instance disposed of by him. But as the principal Sheriff may himself in all cases in the Sheriff-Court act in the first instance, and as the competency of his doing so is expressly recognised in many clauses of the Act of 1880 and Act of Sederunt following on it, this right of appeal is not available where he chooses to exercise this power. In such cases, and in cases where he has reviewed the interlocutor of the Sheriff-Substitute, there is no appeal from the decision of the principal Sheriff.(q) Where an appeal from the decision of the Sheriff-Substitute is not competently taken to the Sheriff under these powers there seems, in like manner, to be no room for any other appeal. It is true that the jurisdiction of the Court of Session is not excluded by other words than those saying that the decision of the lower court is to be "final," but in the case of a statutory jurisdiction this should be sufficient. The power of the Court of Session in such cases is limited to the power of recall, but under it there may be a very effectual power of review.

The case in which an appeal from Sheriff-Substitute to principal Sheriff is competent is to be gathered from the Court of Session Act of 1857,(r) where it is said that no review is competent of any interlocutor pronounced with a view to investigation and inquiry, but only of the interlocutor which finally disposes of the application upon the merits. This language is different from that used to define a "final judgment" in the Court of Session Act of 1868, though its purport is much the same. But it is important to note that

(p) Act of 1880, § 4 (5).

(q) Act of 1880, § 4 (10).

(r) 20 & 21 Vict. c. 56 (Distribution of Business Act) § 6.

the latter Act is inapplicable, and that there is therefore apparently no appeal against an interlocutory judgment even with leave.(s) For the same reason it will follow that the time of appeal (eight days) fixed by the Act of 1857, which is one of the things which affect the competency of appealing, will be binding in the Sheriff Court in place of that fixed either by the Act of 1868 or the Act of 1876. The form of appealing in the Court of Session is by reclaiming note, but in mere matters of form it will hardly be held necessary that the procedure should be the same, and an appeal taken in the ordinary form in the Sheriff Court should be enough.

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### Section XIII.—ACTION FOR FORFEITURE OF FEU-RIGHTS.

Where the feu-duty for subjects which do not exceed £25 in annual value has run in arrear for two years, the Sheriff has power, on the application of the superior, to remove the vassal from the possession.(a) The superior raises an action in ordinary form, taking care to set forth that the subjects are of the value which makes the action competent, and that the feu-duty has run in arrear for two years,(b) and concluding that the vassal be removed from his possession, and that warrant to that effect be granted. The action proceeds in the ordinary form. When the defender fails to appear, decree is pronounced. If he does appear, a record is made up; and then, upon such evidence as the Sheriff may require as to the value of the subjects, and as to the feu-duty being in

(s) M'Nab, 21st Dec. 1871, 10 M.  
248.

(b) Whyte v. Gerrard, 30th Nov.  
1861, 24 D. 102.

(a) 16 & 17 Vict. c. 80, § 32.

arrear, decree may be given. Where the defender objects to the pursuer's title, the Sheriff cannot entertain the objection unless it be such that its grounds are instantly verified by the superior's titles. If the objection be not of this kind, it is to be disregarded in the Sheriff Court, and made good in an action of declarator in the Court of Session, which the defender is at liberty to bring at any time within a year from the date of removal.(c)

When decree of removal is pronounced, it must be executed at the first term of Whitsunday or Martinmas which occurs four months after it has been issued by the Sheriff.(d) It is declared to have the effect of the old decree *ob non solutum canonem*, and the vassal can purge the irritancy (by paying the arrears and expenses) at any time before the execution of the warrant.

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#### Section XIV.—INTERDICTS.

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| 1. <i>Nature of Remedy.</i>                 | 5. <i>Proceedings in Interdict Process.</i>     |
| 2. <i>Form of Application.</i>              | 6. <i>Competency of applying to Two Courts.</i> |
| 3. <i>Interim Interdict.</i>                | 7. <i>Breach of Interdict.</i>                  |
| 4. <i>Caveat against Interim Interdict.</i> |   |

1. **Nature of Remedy.**—In the process of interdict, a court is asked to prohibit a person from doing or continuing to do some particular act.(a) The act complained of must be illegal or wrongful, and the complainer must have a title and interest to object to it; but beyond these requisites there is scarcely

(c) *Hope v. Aitken*, 18th Jan. 1872, 10 M. 347, may be consulted as an example of proceedings under this section of the Act of 1853.

of the decree or from the date of the extract is not clear.

(a) *Kelso School Board v. Hunter*, 18th Dec. 1874, 2 R. 223.

(d) Whether this means from the date

a limit to the kind of act against which interdict may be granted.(b) The act must be one of which the pursuer has reasonable ground to suspect or fear the committal;(c) and there must be proof of wrong done or intended before the permanent interdict will be granted;(d) although an interim interdict may be more easily given. The act must also be one which is comparatively recent; for if the act complained of have been repeated for many years, a declarator and not an interdict against its continuance is the proper remedy.(e) As the remedy is one which consists in prohibiting, it is evidently inappropriate where the legal act complained of is completed, and is not of a kind which admits of repetition. For instance, it is too late to ask for interdict against building on a piece of ground after the house has been half-built.(f) In such cases there is always a remedy by declarator, or removing, or ejection,(g) or by petition for re-delivery, as the case may be; but it is evidently absurd to ask a court to prohibit what has happened.

**2. Form of Application.**—The process of interdict is a summary process, commencing by petition. The grounds on which the interdict is asked are set forth on principles the same as those on which the grounds of action are stated in

(b) Among incompetent cases may be mentioned interdict to prevent the negotiation of a bill (*Thom v. North British Bank*, 8th June, 1848, 10 D. 1254), and against the use of inhibition (*Beattie v. Pratt*, 20th July, 1880, 7 R. 1171).

(c) *Moncreiff v. Arnott*, 18th Feb. 1828, 6 S. 530; *Weir v. Glenlynn*, 7th April, 1834, 7 W. and S. 244.

(d) *King v. Hamilton*, 17th Jan. 1844, 6 D. 399. If an act have been done in good faith, and there be no rea-

son to fear its repetition, there is no room for interdict, though the act have been illegal (*Hay's Trustees v. Young*, 31st Jan. 1877, 4 R. 398).

(e) *Grierson v. Sandsting School Board*, 21st Jan. 1882, 9 R. 437.

(f) *Lowson v. Crammond*, 16th Nov. 1864, 3 M. 53; see also *Glen v. Caledonian Railway*, 23rd May, 1868, 6 M. 797.

(g) *Johnston v. Thomson*, 9th June, 1877, 4 R. 868.

other actions. The remedy craved is specified in the prayer; and the act or acts which the Court is asked to prohibit must be set forth distinctly. This is essential, for the party involved must be put in a position to be able to know what he may do without fear of contravening the order, and what acts will bring him under the penalties of breach of interdict.<sup>(h)</sup> As the petition should always conclude specially for interim interdict,<sup>(i)</sup> it is doubtful whether it would be competent to give it without a special prayer for it.<sup>(j)</sup> The petition may contain a conclusion for damages,<sup>(k)</sup> or indeed may be combined with any other conclusion competent in an ordinary action.

On the petition being presented, an order for service is pronounced. This directs a copy to be served on the defender, and allows him a certain number of days to enter appearance. This order may also dispose of the question of interim interdict until parties are heard.

**3. Interim Interdict.**—The use of interim interdict is to preserve matters intact until the rights of the parties are determined. It is often granted, till parties are heard, on consideration merely of the statements in the petition, it being sometimes necessary to act on the moment; but it should not be granted without due regard to the consequences both of granting and of refusing. Sometimes it is not granted except on caution for damages; and sometimes it is refused if caution be found by the opposite party.<sup>(l)</sup> When granted before the defender has appeared, he can, on entering

(h) *Cathcart v. Sloss*, 22nd Nov. 1864, 3 M. 76.

(i) 39 & 40 Vict. c. 70, sch. A.

(j) But see A. S., 10th July, 1839, § 137.

(k) *Ibid.* § 138.

(l) This is matter of common prac-

tice. See, *inter alia*, *Curtis v. Sandison*, 29th Nov. 1831, 10 S. 72, where interdict was granted on the pursuer finding caution; and *Johnston v. Dumfries Road Trs.*, 19th July, 1867, 5 M. 1127, where it was refused on the defender finding it.

appearance, move to have it recalled ; and, indeed, unless the interlocutor be specially worded, it is liable to recall at any moment.

Intimation of the interim interdict is a necessary step where the respondent or his agent has not been present when it has been granted. The intimation may be made either by an officer of court or by a notary. Postal intimation, seeing what may follow, would be inexpedient.(*m*) If the respondent were present or represented at the granting, intimation is unnecessary. When the respondent is represented in the cause, but neither he nor his agent was present at the granting, the agent's subsequent knowledge of the interim interdict will be presumed to be the respondent's also, though the presumption may be removed by proof that he was actually and excusably ignorant of the circumstance. An interlocutor continuing an interim interdict is intimated in the same way as one granting it. As criminal proceedings may follow the breach it is necessary to be particular about the respondent knowing of the interdict.(*n*)

If the Sheriff-Substitute grants, or refuses to grant interim interdict, the interlocutor may be reviewed by the principal Sheriff(*o*) When interim interdict, granted by the Sheriff-Substitute, has been recalled by him, an appeal against the interlocutor recalling has not the effect of continuing the interdict, for the process is in the same position as if interim interdict had never been granted.(*p*) But an interim interdict, though appealed, is binding till recalled.(*q*)

(*m*) See 45 & 46 Vict. c. 77, where the expressions used—warrant of citation, warrant of service, and judicial intimation—hardly cover interim interdict.

(*n*) *Henderson v. Maclellan*, 23rd May, 1874, 1 R. 920.

(*o*) 39 & 40 Vict. c. 70, § 27 ; *Argyle v. M'Arthur*, 28th June, 1861, 23 D. 1236.

(*p*) *Laird v. Miln*, 16th Nov. 1833 12 S. 54.

(*q*) 39 & 40 Vict. c. 70, § 31.

It seems that though a process fall asleep an interim interdict remains effectual.<sup>(r)</sup>

**4. Caveat against Interim Interdict.**—When a party has reason to fear that another is to apply for interdict against him, he can enter (with the Sheriff-Clerk) a “caveat,” and this will ensure him notice of the presentation of the petition, and an opportunity of being heard before interim interdict is granted. He must be prepared, however, to discuss the question immediately on receiving the notice, because he is not entitled to time.

**5. Proceedings in Interdict Process.**—Except as regards the matter of interim interdict, the process of interdict is conducted in the ordinary style.

**6. Competency of applying to Two Courts.**—It has happened that parties have presented petitions for interdict both to the Court of Session and to the Judge Ordinary; but in such an event there can be little doubt that the second application is incompetent—if both are not—for there is no authority for holding that the ordinary rules as to *lis alibi pendens* do not apply to interdict as well as to other processes. In a case where interim interdict was refused in the Sheriff Court, and the pursuer (without abandoning the proceedings there) brought a process of interdict in the Court of Session, Lord Deas and Ardmillan thought it incompetent; and though the other two Judges of the First Division decided the case on the relevancy, they suggested no opposite opinion on this point.<sup>(s)</sup>

<sup>(r)</sup> *Hamilton v. Allan* (Court of Session case), 16th Feb. 1861, 23 D. 589; 39 & 40 Vict. c. 70, § 49.      <sup>(s)</sup> See *Cathcart v. Sloss*, *supra*, note (g).



**7. Breach of Interdict.**—The remedy given by an interdict being a negative one, the holder of the decree cannot enforce it by imprisonment, as if it were a decree *ad factum præstandum*. If the defender transgress the order, the pursuer's remedy is to prosecute for breach of interdict. This is done by a petition, in which the pursuer can conclude to have matters restored as they were; to have the defender found liable in damages; to have him made to find caution not to repeat the offence; (t) to have him fined for contempt of Court, and imprisoned if he fail to pay the fine; and to have him found liable in expenses. If the petition contains a prayer for fine or imprisonment, it comes to have somewhat of the character of a criminal prosecution; the concurrence of the prosecutor-fiscal is required; (u) and it seems that the defender must be present at the time of pronouncing sentence. (v) The procedure is otherwise the same as in an ordinary petition. Answers are sometimes ordered and the proof taken summarily, but the better course seems to be for a record to be made up and closed, after which a proof will be allowed, and taken and recorded in the way proper to civil actions. (w) The defender may be judicially examined, (x) and though it was at

(t) See *Gray v. Petrie*, 17th Feb. 1848, 10 D. 718, for an example of caution being ordered.

(u) *Northumberland v. Harris*, 23rd Feb. 1832, 10 S. 366.

(v) See authorities cited in *Anderson v. Connacher*, 20th Dec. 1850, 13 D. 405. The presence of the defender is not required where he is merely found liable in expenses, or in a merely nominal penalty.

(w) *Henderson v. Maclellan*, 23rd May, 1874, 1 R. 920. In the Court of Session such cases are tried in the proceeding known as a "petition and complaint." In the Sheriff Court case of

*Brown v. Thomson*, 20th July, 1882, 9 R. 1183, which was fully discussed, no objection was taken to the procedure, and there the petition was in the new form; answers were ordered; the respondent appeared (as ordained) at the first diet (when he pleaded not guilty); a record was closed, the proof taken and recorded in the usual way, and the respondent was not present when fined one shilling by the Court of Session.

(x) *Mackay v. Ross*, 23rd Sept. 1853. 1 Irv. 288. The case of *Duncan v. Ramsay*, 15th April, 1853, 1 Irv. 208, proceeded on specialities.

one time considered that it would be unsafe to examine him as a witness, (y) the competency of doing so is now settled. (z) The pursuer must prove the breach of the interdict ; and, as the consequences are serious, great exactness is required, the interdict being strictly construed. An interdict against drawing boats upon an island was not held to be infringed by the defender drawing his boat till it grounded in the shallow water on the shore. (a) The penalty in a breach of interdict is in the discretion of the Court, and the fine varies according to the circumstances, from a nominal fine to one of large amount. (b) It is made payable to the public prosecutor, and he may recover it by the method in use for civil decrees ; (c) or, if the sentence contains authority to that effect, may imprison the defender, for the time specified, in case of non-payment. (d)

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### Section XV.—LAW-BURROWS.

Law-burrows is an old form of process still in use, by which a person who dreads bodily harm from another obliges the other to find caution not to trouble him. By the Civil Imprisonment Act of 1882, the form has been greatly modified and improved.

The mode of application is by a petition (in the new form)

(y) Compare Dickson on Evidence, § 1707.

(z) *Miller v. Bain*, 9th July, 1879, 6 R. 1215.

(a) *Menzies v. Macdonald*, 13th Feb. 1864, 2 M. 652.

(b) *Caledonian Railway v. Hamilton*, 3rd August, 1850, 7 Bell's Ap. Ca. 272.

(c) *Beattie v. Rodger*, 14th Nov. 1835,

14 S. 6.

(d) The Act abolishing imprisonment for civil debt expressly excepts the case of fines or penalties due to the Sovereign (43 & 44 Vict. c. 34, § 4), and seems not to be applicable to the case of persons imprisoned for breach of interdict.

setting forth (in substance) the fear which the applicant entertains. It concludes that the defender be bound to find caution for a specified sum, or for such sum as the Sheriff shall think right, not to molest the pursuer, and further that, if he fail to find caution, he be put in prison for a period not exceeding six months, or till otherwise liberated in due course of law. The old procedure was that, after presenting the petition, the applicant appeared before the Sheriff and swore to its truth, but now the Sheriff orders the petition to be served, and grants warrant to both parties to cite witnesses for a diet which he fixes in his order. At the diet appointed, or at an adjourned diet, the application is disposed of summarily under the provisions of the (Criminal) Summary Jurisdiction Acts, and without any written pleadings or record of the evidence. Expenses may be awarded against either party. The parties are competent witnesses, and the prayer of the petition may be granted on the sworn testimony of one credible witness, even though such witness be a party. This seems to alter the old law, which was that in cases between husband and wife,<sup>(a)</sup> or parent and child,<sup>(b)</sup> the applicant must bring some corroborative evidence that he has cause to dread bodily harm. The order fixes the amount of caution to be found, and allows a certain short time for the defender to find it; or it may, in place of caution, direct the party to grant his own bond for duly implementing its terms. In either case the party may be ordered, on failing to find the caution or to grant the bond, to be imprisoned for a period not exceeding six months. There is no power to imprison for non-payment of the expenses, which must, therefore, be recovered as a civil debt. When in prison, the

(a) Thomson, 7th March, 1815, F. C.;  
Calder, 24th Feb. 1841, 3 D. 615.

(b) Taylor, 25th June, 1829, 7 S.  
794.

applicant is not bound to aliment the prisoner, who is treated as if imprisoned for contempt of court.(c)

If the warrant has been improperly obtained, the defender must apply to the Supreme Court for redress, but in what form is not now clear. If it be held that the reference to the Summary Jurisdiction Acts gives the right of appeal conferred by them, then he must proceed under their provisions. But if (as seems to be intended) this reference regulates nothing more than the proceedings at the diet for proving, and this right of appeal be not conferred, the defender must present a note of suspension to the Court of Session if he has not been imprisoned, and one of suspension and liberation if he is in prison.(d) This note may be "passed" (so as to try the question) on such caution as the Court think fit, there being no rule on the subject. Where the defender offers to prove that the application was made maliciously and without probable cause, the Court may dispense with any caution.(e) What it is necessary to show before the warrant will be quashed, appears to be a good deal. In a recent case in the Court of Session it was held that the warrant could not be set aside unless the defender proved that the application was made both maliciously and without any probable cause.(f) This makes the power of setting aside the warrant almost useless, because malice is very difficult to prove, and it may be doubted whether the decision did not proceed on stricter views than the policy of the various statutes required. When it is proved that the warrant is illegally taken out, the pursuer is liable in damages.

(c) 45 & 46 Vict. c. 42, § 6.

Jurist, 682.

(d) *Smith v. Baird*, 26th Jan. 1799,  
M. 8043.

(f) *Brock v. Rankine*, 5th June, 1874,  
1 R. 991; *Randall v. Johnston*, 28th

(e) *Gadois v. Baird*, June, 1856, 28

June, 1867, 40 Jurist, 554.

If the Sheriff refuses the petition, there seems to be no right of appeal, and the pursuer has not now the choice he once had of taking out a summons of law-burrows in the Court of Session or Court of Justiciary.(g)

#### Section XVI.—REGULATION OF MARCH FENCES.

The regulation of march fences belongs to the Judge Ordinary. If there be no fence, or an insufficient fence, between conterminous proprietors, the Sheriff may, on the application of either of them, appoint a suitable fence to be erected, or a former fence to be repaired, at their joint expense; and if the old boundary be irregular, the Sheriff has power to straighten the march by taking, as far as may be, equal portions from each property and adding them to the other.(a) Where the lands are entailed, their exchange must be fortified by an excambion under the Montgomery Act.(b)

The regulation as to building and repairing fences is applied only to lands suitable for being enclosed, and not to extensive moor lands. It is inapplicable where there is a sufficient natural fence. To prevent hardship, it is also not applied to lands of less than five or six acres in extent, or to any case where the expense would be out of proportion to the obtainable benefit. The regulation as to the straightening of a march cannot be carried out if there is a dispute as

(g) 45 & 46 Vict. c. 42, § 6 (1).

(a) 1661, c. 41 (ratified by 1685, c. 39), and 1669, c. 17. It is matter for the Sheriff's discretion whether an old

fence is to be repaired or rebuilt; *Paterson v. Macdonald*, 16th June, 1880, 7 R. 958.

(b) *Supra*, p. 428.

to the existing line. In that case the process must be sisted till the dispute be settled by declarator; and then, when the actual boundary is ascertained, the Sheriff may proceed to adjust it.(c)

Processes for the regulation of fences are conducted in the ordinary manner, the only peculiarity being, that in straightening marches the Sheriff is required by the Act 1669, c. 19, to visit and inspect the ground. He cannot delegate this duty even with the parties' consent, but he may take such assistance from men of skill, in addition, as he may think expedient.(d)

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### Section XVII.—MARITIME CASES.

- |   |                                  |
|---|----------------------------------|
| 1. <i>Ordinary Jurisdiction.</i>              | 3. <i>Recovery of Salvage.</i>   |
| 2. <i>Summary Recovery of Seamen's Wages.</i> | 4. <i>Set and Sale of Ships.</i> |

**1. Ordinary Jurisdiction.**—Maritime causes comprehend questions of charter - parties, freights, salvages, wrecks, bottomries, policies of insurance, and, in general, all contracts concerning the loading or unloading of ships, and all actions for the delivery of goods sent on ship-board, or for recovering their value.(a) These causes when arising within the district, and in the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds belonging to it, may be brought before the Sheriff.

(c) See *Strang v. Stewart*, 31st March, 1864, 2 M. 1015; *affd.* 15th Feb. 1866, 4 M. (H. L.) 5; and case cited in next note.

(d) *Lord Advocate v. Sinclair*, 26th Nov. 1872, 11 M. 137.

(a) *Ersk. i. 3. 33.* As to salvage, see *infra*, art. 3. The "Forms of Proceedings" of Mr. Robert Neill may be consulted with great advantage in all maritime questions.

The jurisdiction extends over foreigners and persons residing out of Scotland, provided the defender, on any legal ground of jurisdiction, is amenable to the jurisdiction of the Sheriff before whom the cause may be raised.(b) This is held to cover the power of founding jurisdiction against foreigners by arrestment *jurisdictionis fundandæ causa* ;(c) and where it is a ship or other vessel belonging to the foreigner which has been arrested within the jurisdiction, the foreigner may be sued not only in maritime actions, but in any action which would be competent against a Scotsman subject to the Sheriff's jurisdiction.(d) In the Merchant Shipping Act there is a special power given to detain foreign ships for claims of damages caused by the misconduct or want of skill of the master or mariners, but it is not much used here, as the more familiar proceeding of arresting to found jurisdiction serves all the purpose in Scotland.(e) If it be used, the ship may be released on security being found ; and indeed all arrestments to found jurisdiction may, like other arrestments, be loosed on caution or consignment.(f)

For causes not exceeding the value of £25, the jurisdiction is privative. When counties are separated by a river, firth,

(b) 11 Geo. IV. and 1 Will. IV. c. 69, § 22 ; and 1 & 2 Vict. c. 119, § 21. "Section 22 of 1 Will. IV. c. 69, having in express terms given jurisdiction to the Sheriff in maritime causes against persons residing furth of Scotland, the subsequent declaratory enactment in § 21 of 1 & 2 Vict. c. 119 cannot be held to take away that jurisdiction, but only to regulate it."—*Per Lord Barcuple in Price v. Owen*, cited *Law Courts Com.* 1868, Evidence, p. 413, and reprinted in *Neill's Forms*, p. 19.

(c) *Bruhn v. Grunwaldt*, 20th Jan.

1864, 2 M. 335. The sum arrested may be small, provided it be not illusory. A debt of £1, 8s. 6d. was held enough in an action for £600 ; *Shaw v. Dow*, 2nd Feb. 1869, 7 M. 449.

(d) 40 & 41 Vict. c. 50, § 8 (4). It should be observed that the power to arrest a ship does not authorise the pursuit of her and the bringing of her back into the jurisdiction ; *Carlberg v. Borjesson*, 22nd Dec. 1877, 5 R. 390, and 9th July, 1878, 5 R. (H. L.) 217.

(e) 17 & 18 Vict. c. 104, § 527.

(f) *Stewart v. Gray*, 19th Dec. 1882, 10 R. 382.

or estuary, the Sheriff of each county has jurisdiction over the whole intervening space occupied by water; but if the defender reside in either of the counties, the cause must be brought in the county where he lives. There is a power in maritime cases of remitting causes from one Sheriff Court to another *ob contingentiam*, or for other sufficient reason.(g) In all other respects maritime causes are conducted like ordinary actions.(h)

**2. Summary Recovery of Seamen's Wages.**—Under the Merchant Shipping Act of 1854, any seaman or apprentice, or person authorised by him, may sue in a summary manner for any wages due to him, not exceeding £50 in amount. The master of a ship has the same remedy. The action may be brought before the Sheriff either of the place where the voyage terminated, or of the place where the person on whom the claim is made resides. The Sheriff's order is final.(i)

The complaint (which is in the form of a petition) does not require to recite the clauses of the Merchant Shipping Act on which it is founded.(j) It is sufficient if they be specified or referred to. The cause of complaint or action, and the remedy sought, must be set forth shortly. The complaint may contain a prayer for a warrant to arrest on the dependence. On being presented to the Sheriff-Clerk, he issues a warrant to cite the defender and witnesses and havers, as well as (when craved) a warrant to arrest. When the day of trial

(g) 11 Geo. IV. & 1 Will. IV. c. 69, § 24.

(h) A. S., 10th July, 1839, § 161.

(i) 17 & 18 Vict. c. 104, §§ 188 and 191.

(j) Although the Merchant Shipping Act provides a form for this petition, it would appear from the authorities

cited, *supra*, p. 371, that the form provided by the Sheriff Court Act of 1876 must now be used, and this seems so understood in practice. See Neill's Forms, p. 148. The instances there given are petitions for summary salvage claims, but the principle is the same. See also Lees' Styles, p. 251.



comes, the parties are heard *viva voce*. It is specially directed that there be no written pleadings, and that the evidence be not written down—no record being kept except the complaint and the decree pronounced. The decree may be enforced by arrestment and poinding, like any other civil decree.<sup>(k)</sup> The use of this summary mode, in preference to the ordinary modes of recovering wages in the Sheriff Court, seems optional.

Suits for seaman's wages under £50 cannot be brought in the Court of Session unless—(1) the owner is adjudged bankrupt or declared insolvent; or (2) unless the ship is under arrest or is sold by the authority of the Court of Session; or (3) unless the Sheriff, acting under the Merchant Shipping Act, refer it to the Court of Session; or (4) unless neither owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.<sup>(l)</sup> It will be observed that these provisions leave untouched the incompetency of making in the Court of Session a claim for wages not exceeding £25 in value,<sup>(m)</sup> and therefore that they practically affect only claims between £25 and £50 in amount.

**3. Recovery of Salvage.**—Where the amount claimed does not exceed £200, or where the value of the property saved does not exceed £1000, the Merchant Shipping Acts prescribe the mode of recovery of salvage. The Act of 1854 made it necessary to refer such a dispute to the arbitration of two justices,<sup>(n)</sup> but the Amending Act of 1862 gives the claimant

(k) *Ibid.* §§ 531 to 539 inclusive, and 541, 542, and 543.

(l) 17 & 18 Vict. c. 104, § 189, as extended by the Act of 1862, 25 & 26

Vict. c. 63, § 49.

(m) *Supra*, art. 1.

(n) 17 & 18 Vict. c. 104, § 460.

the option of referring it to the arbitration of the Sheriff.(o) If the sum in dispute exceeds £50, there is an appeal from the Sheriff's decision to the Court of Session, but otherwise the Sheriff's decision is final.(p)

The claim being a proceeding under the Merchant Shipping Act, must be brought and conducted in a summary form, in the way prescribed by the Act, and described in the preceding article.(q) The proceedings are subject, however, to certain special regulations. The claim may begin with a reference instead of a petition. It must be brought, in case of wreck, before the Sheriff resident at or near where it is found; in case of services to a ship or boat, before the Sheriff resident at or near where it is lying, or the first port to which it is taken.(r) The Sheriff may call to his assistance any person conversant with maritime affairs as assessor, or may refer the claim to such a person as umpire. The Sheriff must determine the dispute within forty-eight hours after it has been referred to him, which must mean (if a petition has been requisite) after the respondent has appeared on the expiry of the *inducia*. If the Sheriff refer it to an umpire, the umpire has forty-eight hours from his appointment in which to determine the dispute.(s) Provision is made in the leading Act for the umpire's remuneration, for calling for the production of documents, and administering oaths.(t) It also has provisions for enforcing the award where the receiver's assistance is requisite, and also for apportioning it.(u)

(o) 25 & 26 Vict. c. 63, § 49 (6, 7, and 8).

(p) 17 & 18 Vict. c. 104, § 464.

(q) 17 & 18 Vict. c. 104, § 531; 1862 Act, § 49 (8).

(r) 17 & 18 Vict. c. 104, § 460.

(s) 17 & 18 Vict. c. 104, § 461. The Sheriff or umpire has power, however, to extend the time by writing under his hand.

(t) 17 & 18 Vict. c. 104, §§ 462, 463.

(u) *Ibid.* §§ 466 to 470 incl.

In cases where an appeal is competent, the evidence should be recorded.(v) In such cases, the Sheriff is bound, on the request of either party, to record the evidence in the usual way; and if in consequence of the want of such a request the evidence have not been recorded, the Court of Session will refuse to entertain the appeal.

The proceedings in the case of an appeal are not well defined. The party must give notice of his intention within ten days, and take his appeal within twenty.(w) When this is done, a certified copy of the proceedings must be transmitted, along with a certificate by the Sheriff of the gross value of the article respecting which salvage is claimed.(x)

If the claim exceeds £200, and the value saved exceeds £1000, it must, unless the parties consent to its being tried in the Sheriff Court, be taken to the Court of Session. If, however, the sum awarded there is less than £200, the claimant gets no costs, unless the Court certify the case to be a fit one for trial in a superior court.(y)

**4. Set and Sale of Ships.**—If the owners of a ship disagree, and cannot arrange their dispute, any one of them may bring the action called “set and sale.” In this the pursuer sets a value on his shares, and offers them to the other owners at a price, or offers to buy their shares at a corresponding rate. If the other owners will neither buy nor sell, he craves warrant to have the ship sold by auction. The action is brought by a petition in the ordinary form, and when the *induciæ* have expired, if no defences to the competency are stated, the defenders declare their election, which they should

(v) *Spence v. Sinclair*, 4th July, 1883,  
20 S. L. R. 726.

(w) 17 & 18 Vict. c. 104, § 464.

(x) *Ibid.* § 465.

(y) *Ibid.* § 460.

do by minute, and decree is pronounced accordingly. If they accept and pay for the pursuer's shares, decree is pronounced adjudging them to the defenders. If, on the other hand, they accept the pursuer's offer for their shares, the decree will have to be framed accordingly. If they refuse either to buy or sell, the ship is sold in the same way as an arrested vessel is sold.(z)

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#### Section XVIII.—ACTION OF MAILLS AND DUTIES.

An action for the payment of rents used to be called an action of mailles and duties, but the name is seldom used now except when the proceeding is taken at the instance of an heritable creditor of the landlord. It is not a step necessary to secure the preference of such a creditor over the landlord's personal creditors, but it is a convenient form, because under it all the tenants can be brought into the field at once, and thus prevented from paying so as to defeat the security.(a) The action is an ordinary one. If the pursuer be in possession of the estate, whether as proprietor or as adjudger, or under any other title which by law gives him the rents, the action is directed against the tenants only; but where the person entitled to the rents is not legally in possession, he must call as defender the person who is in such possession, as well as the tenants. Should a question of heritable title arise, the action must be sisted; but tenants cannot object to the title of the person from whom they derive their right, or to that of his heir, provided either were infeft.

(z) *Supra*, p. 360.

(a) *Webster v. Donaldson*, 1780, M.

2902, Bell's *Conveyancing Lectures*, 3rd ed., p. 1169.

If a third party appear in the process, having also an infestment, the pursuer must prove that he or his author has been in possession of the rents for seven years immediately preceding.(b)

The action sets forth the pursuer's title, and the names and designations of the tenants, with their respective tenures, and concludes for payment of the rents. It may conclude not only for the arrears, but for rent due at a coming term, that term being first come and bygone.(c)

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#### SECTION XIX.—MEDITATIO FUGÆ

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|---|---|
| 1. <i>Debt on which Warrant competent.</i>    | 5. <i>Oath of Creditor.</i>                 |
| 2. <i>What Persons may be Apprehended.</i>    | 6. <i>Granting Warrant of Apprehension.</i> |
| 3. <i>What Sheriff may issue the Warrant.</i> | 7. <i>Examination of the Debtor.</i>        |
| 4. <i>Form of Application.</i>                | 8. <i>Proof.</i>                            |
|   | 9. <i>Order to find Caution.</i>            |

The *Meditatio Fugæ* warrant is issued on the application of a creditor, who swears to the verity of his debt, and also to his belief that the debtor means to leave Scotland ; specifying in his oath such circumstances as afford reasonable ground for justification of that belief. Under this warrant the debtor is immediately apprehended and brought before the judge, who, after an examination into the circumstances, either liberates him as one against whom there is no just ground of suspicion, or authorises his imprisonment till he shall find security to

(b) Hunter on Landlord and Tenant,  
4th ed., vol. ii. p. 354.

(c) Woodward v. Wilson, 10th March,  
1829, 7 S. 566.

appear in an action to be raised against him within a certain time, usually six months; or, if there be diligence (under which imprisonment is competent) subsisting against him, to abide the course of it.(a)

Nothing contained in the Debtor's Act of 1880 prevents the apprehension or imprisonment of any person under a warrant granted against him as *in meditatione fugæ*.(b) Therefore, although imprisonment for civil debt is abolished, the remedy is still competent, where it can be of any use to the creditor. It is, however, now incompetent where it can be of no use, as in the case of a creditor who has already obtained an extract decree for a debt under which imprisonment is incompetent.(c) The attempt to extend this exception so as to make the remedy incompetent in almost all cases shows a misconception of its nature. Where it is used before judgment is pronounced, or even before extract can be issued, it seems still competent in all debts, because then it is the only compulsitor which the creditor can use to make the debtor abide the jurisdiction.(d)

**1. Debt on which Warrant competent.**—It is not necessary that the debt be exigible at the time, or even that it have been proved to be due. It may be a debt future, contingent, or unconstituted. Thus, it was held competent to apprehend an absconding tenant till he found caution not only to meet an action for arrears and current rent, but to meet actions (should it be necessary to raise them) for the rent of all the years of his lease yet to come.(e) A common case of

(a) 2 Bell's Com. (5th ed.) 559

(b) 43 & 44 Vict. c. 34, § 4.

(c) Kidd v. Hyde, 19th May, 1882, 9 R. 803.

(d) Pascoe v. Simpson (Lanarkshire

Sheriff Court), 12th Feb. 1883, 27 Journal of Jurisprudence, 219.

(e) McGill v. Ferrier, 9th March, 1838, 16 S. 934.

the use of the warrant shows well the kind of debt for which it is issuable. A woman pregnant with an illegitimate child can have the alleged father, should he be leaving Scotland, apprehended till he find caution to meet an action for the inlying expenses and aliment.(f) In this case the debt has every possible element of uncertainty about it. Care must be taken not to use the remedy for civil debts which, exclusive of interest and expenses, are under £8, 6s. 8d, as, in the case of such debts, civil imprisonment has been entirely abolished, without any reservation of the right to apprehend or imprison *in meditatione fugæ*.(g)

**2. What Persons may be Apprehended.**—The warrant is usually used against domiciled Scotchmen about to leave Scotland; and it does not appear that the fact of the debtor having abundance of property, real or personal, to meet the claim, is ground for making an exception.(h) If a person, after contracting debt, leaves Scotland, but returns for any purpose, he is liable to the use of the warrant.(i)

Foreigners while in Scotland are liable to the diligence if they contract debt here;(j) and if a foreign debtor be found in Scotland absconding from his foreign creditors, they may make use of the diligence to stop his farther flight.(k)

Persons who in the course of their employment in the public service are ordered abroad on duty cannot be stopped by this diligence.(l) As all who contract with such persons

(f) *Davies v. Duncan*, 9th Feb. 1861, 23 D. 532.

1832, 6 W. and S. 271.

(j) *Ersk. i. 2, 21.*

(g) 5 & 6 Will. 4 c. 70; *Marshall v. Dobson*, 18th Dec. 1844, 7 D. 232. The Act does not apply to taxes, rates, fines, and sums decerned for aliment.

(k) *Ray v. Bellamy*, 21st June, 1763, M. 2051; 2 *Bell's Com.* (5th ed.), 563. *Irvine v. Hart*, 19th March, 1869, 7 M. 723.

(h) *Heron v. Dickson*, 16th Dec. 1773, M. 8550.

(l) *Service v. Hamilton*, 25th May, 1811, 2 *Bell's Com.* (5th ed.), 563; *Bryson*, 10th March, 1812, F. C.

(i) *Crowder v. Watson*, 16th Aug.

know their liability to such orders, and need not give credit unless they please, it would be unreasonable on their account to allow any interference with the public service.

The intention of the debtor must be to leave Scotland; it is not enough that he be going from one part of it to another.<sup>(m)</sup> It is not necessary that it should be any part of his object in leaving to escape payment of the debt; it is enough that it will have the effect of removing him from the jurisdiction of the Scottish courts.<sup>(n)</sup> But it must be a removal of a kind that will have such effect, for if the absence is *bona fide* to be a temporary one, whether for business or pleasure, there is no reason for making any extraordinary interference with the debtor's personal liberty.<sup>(o)</sup>

If the debtor have actually left Scotland, the diligence cannot, as I think, be used to bring him back to the country, though a contrary opinion has received effect in other quarters.<sup>(p)</sup> It seems to me that if the debtor have gone to some other part of the United Kingdom, application ought to be made to the Courts having jurisdiction where he is; and that if he have left the United Kingdom, it is very clear that there is no case for his extradition.

**3. What Sheriff may Issue the Warrant.**—It is not necessary that the warrant should be issued by the court which is to try the cause; it is an act of magisterial duty which should be performed by the Judge Ordinary of the

<sup>(m)</sup> *Laing v. Watson*, 20th Dec. 1789, M. 8555. "Retiring to the sanctuary" was not held to justify the warrant, as there was a prison in Holyrood to keep the debtor from leaving the country if he showed any tendency towards that; *Place v. Donnison*, 2nd

July, 1814, F. C.

<sup>(n)</sup> *Jackson v. Smellie*, 22nd Nov. 1865, 4 M. 72.

<sup>(o)</sup> See *Gorman v. Hedderwick*, 3rd Feb. 1827, 5 S. (o.e.) 291.

<sup>(p)</sup> *Sellar's Forms*, p. 172.



jurisdiction within which the debtor is found.(*q*) The Sheriff of the sheriffdom in which the defender resides has also jurisdiction, and that although the defender may not be in it at the time. If the action be in dependence, the judge before whom it is tried should have a like jurisdiction. Where an application was made to a Sheriff within whose jurisdiction the debtor neither resided nor was at the time, but where he was expected to come, and where, on coming, he was apprehended on the warrant prepared for him, the jurisdiction was questioned, but apparently without sufficient reason, for the debtor was within the jurisdiction at the time of executing the warrant which began the process in so far as he was a party to it.(*r*)

**4. Form of Application.**—The petition, which is drawn like other special applications, in the form provided by the Act of 1876,(*s*) sets forth the debt which is due or claimed; and it should do this in a specific form. For instance, if the debt be one consisting of damages due, the petition should set forth the act or acts for which they are claimed, as well as their amount;(t) but if the nature of the debt be set forth in the petition so as to leave no doubt as to what is claimed and as to the competency of issuing a warrant for the claim, the precise amount due may be stated afterwards in the course of the proceedings.(*u*)

(*q*) 2 Bell's Com. (5th ed.) 559, founding on *Barrowfield v. Weatherspoon*, June, 1727, M. 8549.

(*r*) *Mantle v. Miller*, 13th Dec. 1855 (reported 31st Jan. 1856), 18 D. 395.

(*s*) *M'Dermott v. Ramsay*, 9th Dec. 1876, 4 R. 217. The point whether the proceeding was one in the "ordinary" court, within the meaning of the stat-

ute of 1876, was not argued.

(*t*) *Campbell v. Robertson*, 20th Nov. 1847, 10 D. 125. In this case doubts were thrown out whether a claim for damages, especially for slander, could be made a ground for granting the warrant. *Ersk. I. ii. 43*.

(*u*) *Davies v. Duncan*, *supra*, note (*f*). The petition stated the claim to

The petition also sets forth the purpose of the debtor to abscond.

**5. Oath of the Creditor.**—After presenting the petition, the creditor appears before the Sheriff, and depones to the verity of the debt, and to the intention of the debtor to abscond. The oath to the verity is in general terms that the debt is due; but it is essential.(v) In giving his oath as to the debtor's intention to abscond, the creditor must detail the grounds on which he founds his belief, and these must be recorded.(w) If the creditor at the time of application be not within the jurisdiction, the oath may be taken before any magistrate in the form of an affidavit, as time would be lost if it were held necessary to take it under a commission. When an affidavit is given, there is a custom of making the agent of a creditor residing in Scotland, or the mandatory of a creditor not residing in Scotland, take a second oath to the effect that he believes the first to be true.(x) Wherever practicable, the oath should be taken before the Sheriff who is to grant the warrant, for a Sheriff who trusts any part of the duties to others in a matter of this kind may incur responsibilities.(y)

**6. Warrant of Apprehension.**—Should the circumstances which are set forth in the creditor's oath be sufficient, if true,

be for inlying expenses and alimony to a child; and the amounts claimed were stated afterwards in a minute.

(v) *King v. Hunter*, 18th May, 1832, 10 S. 544.

(w) 2 Bell's Com. (5th ed.), 560; *Laing v. Watson*, 20th Dec. 1789, M. 8555.

(x) See Bell's Com., *ut supra*. The

proceeding is unintelligible. If the law desire to make the agent or mandatory responsible for the good faith or truth of the affidavit it should say so at once.

(y) See *Anderson v. Smith*, 26th Nov. 1814, F. C., where it was much doubted whether a magistrate could act on an examination taken by his clerk on a remit.

to show that the debtor is about to leave the country, the Sheriff may issue the warrant to apprehend the debtor and bring him before him for examination. This warrant may be executed beyond the sheriffdom, provided that the officer executing it be either a messenger-at-arms or an officer of the sheriffdom from which it is issued.<sup>(z)</sup> If the warrant is to be executed in another sheriffdom by an officer of that sheriffdom, an indorsation or a warrant of concurrence must be obtained from its Sheriff.

The warrant may be executed on a Sunday.<sup>(a)</sup>

**7. Examination of the Debtor.**—On the debtor being brought before the Sheriff, he is examined as to the debt and as to the intention to abscond.<sup>(b)</sup> With regard to the debt, it is not very material what he says. The important part of the examination is as to the absconding. If he admits the intention to leave Scotland, or facts which sufficiently prove it, he may be at once ordered to find caution *de judicio sisti*. If he deny the intention, then the Sheriff will have to consider whether in the whole circumstances the debtor ought to be set free unconditionally, or on caution to await the results of the proceedings.

The examination is dictated to the Sheriff-Clerk, and is taken down—except that it is not on oath—in the same way as the deposition of a witness taken on commission.

**8. Proof.**—When the intention to abscond is denied, a proof is allowed, and it proceeds at once, without any other record than the petition and oath on the one side, and the

<sup>(z)</sup> 1 & 2 Vict. c. 119, § 25.

<sup>(b)</sup> *Service v. Hamilton*, 25th May,

<sup>(a)</sup> *Blair v. Simpson*, 6th July, 1821, 1811, *supra*, note (1).

1 S. (o.e.) 107.

declaration on the other. The petitioner begins the proof, as the burden of proving the intention of the debtor to abscond lies with him. Proof in regard to the debt is not taken. The utmost despatch is given, the proof being generally taken on the day of the examination, or the day after it.

**9. Order to find Caution.**—On the intention to abscond being admitted or proved, the debtor is ordered to find caution *de judicio sisti*; or, if it be diligence that he is avoiding, caution to abide its issue. The caution to meet the action is coupled with the condition that the action be brought within a specified time, usually six months. If the debtor cannot find the caution, he is committed to prison, and must remain there until the action is settled, provided it be brought within the specified time. So long a period as six months for bringing the action should not be allowed unless it be necessary, because the Court has held that when it is allowed the debtor cannot object to the creditor taking the full period, though there may be no occasion for it.<sup>(c)</sup> When the action is brought it seems that the judge has the control over the debtor's custody, and may liberate him on such terms as he finds reasonable.

When caution is found, the cautioners must be sufficient in the opinion of the Sheriff-Clerk to meet the penalty which will be due if the bond be forfeited. The bond obliges the cautioners to produce the debtor at any time during the progress of the action, on getting reasonable notice. If in answer to a call, or at the cautioner's instance, the debtor be produced at the bar, the cautioner may protest that he has fulfilled his duty, and be discharged. The debtor may then be apprehended

(c) See case cited note (o).

again, but a new warrant for this purpose is necessary,(d) though it may be obtained in the original petition and without leading further proof to show that the debtor intends to abscond.(e) The creditor's right to call for the debtor ends on the process being extracted. If the debtor be not produced, the bond is forfeited, and the penalty is having to pay everything that is due in the action.(f)

If caution be not found as ordered, and the debtor be committed to prison, it is held in practice that he is a civil prisoner, and as such entitled to aliment under the Act of Grace.(g)

#### Section XX.—PROCESS OF MULTIPLEPOINDING.

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| <ol style="list-style-type: none"> <li>1. <i>Competency of Action.</i></li> <li>2. <i>Proceedings in Multiplepoinding.</i></li> <li>3. <i>Ascertaining the Fund in medio.</i></li> <li>4. <i>Order for Claims.</i></li> </ol> | <ol style="list-style-type: none"> <li>5. <i>Record and Disposal of the Claims.</i></li> <li>6. <i>Late Appearance of Claimants.</i></li> </ol> |
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**1. Competency of Action.**—When two or more persons are claiming from another something which he holds in his possession, the process by which the right to the thing, or to a share of it, may be determined, is called a multiplepoinding. The thing in dispute may consist either of money or of goods; or it may be a deed, but in the Sheriff Court it cannot be an heritable subject, unless it be under the value specified in the Act of 1877.(a) As it commonly consists of money, it is called the *fund in medio*, whatever its exact nature may be.

(d) *Clark v. Bremner*, 21st Dec. 1881, 9 R. 372.

(e) *Douglas v. Wallace*, 17th Dec. 1842, 5 D. 388.

(f) *Muir v. Collett*, 23rd Nov. 1866, 5 M. 47.

(g) *Guthrie's Select Cases*, p. 20; *Prisons Act*, 1877, § 71, containing definition of "civil prisoner," *supra*, p. 383, note (b).

(a) 40 & 41 Vict. c. 50, § 8.

The action may be raised by any person who is subject to competing claims. In this case the essence of the action is that the holder be subject to at least two claims; that is, that there be what is called double distress. A claim of the nature of a debt upon the fund (that is, a claim which goes to diminish the amount divisible and not to demand a share of it), does not, where the holder is competent and willing to dispute the claim, give rise to the kind of distress which authorises a multiplepinding, because there the claim can be settled in an ordinary action at the instance of the claimant against the holder.(b) As a general rule, a multiplepinding will not be sustained when the dispute can equally well be determined in some other and less expensive form of ordinary action. But even a claim of debt on the funds may make a multiplepinding competent, if the claimant will not raise his action so as to have the question settled, and the holder is thus impeded in paying over the fund to those whom he considers to have right to it.(c) It is no objection to the competency that one of the contending claimants holds a decree for his debt while the other does not,(d) but a multiplepinding does not of itself stop the use of diligence.(e)

The action may also be raised by or in name of trustees or executors, for the purpose of obtaining a judicial discharge. In this case double distress is not necessary. It is enough that the holders are unable to obtain their discharge without calling the claimants into Court.(f) The difficulty, however,

(b) *Crokat v. Panmure*, 8th June, 1858, 15 D. 737; *Mitchell v. Strachan*, 18th Nov. 1869, 8 M. 154; compare *Park v. Watson*, 21st Nov. 1874, 2 R. 118.

(c) *Blair's Trustees v. Blair*, 12th Dec. 1863, 2 M. 284.

(d) *Pollard v. Galloway*, 21st Oct. 1881, 9 R. 21.

(e) *Ferguson v. Bothwell*, 3rd March, 1882, 9 R. 687.

(f) *Dunbar v. Sinclair*, 14th Nov. 1850, 13 D. 54.

must be real. Thus, it will not entitle the trustees to bring the action, that a person has refused a discharge who, after stating a claim, had by letter withdrawn it, and agreed to the money being paid to the competing claimant.(g) Nor can a beneficiary throw a trust estate into Court merely because the trustees are going to admit a debt which he thinks is not due.(h) Here the beneficiary could prevent the payment by interdict or declarator;—the same principle applying in the case of trustees as of other holders, namely, that the action of multiplepoining must not be used where a less complicated form of action would serve. Another illustration of this rule is that the action must not be used to wind up the estates of insolvent persons. If a private trust for that purpose is to be superseded, it must be by proceedings under the Bankruptcy(i) or Cessio Acts.

The action of multiplepoining is one for the actual division of funds requiring to be immediately paid over. It is not meant for the settlement of questions of right, which do not require to be carried into effect until a future date. Thus, a multiplepoining is not a competent process for settling how a fund is to be divided at the death of a liferenter who is still in life.(j)

The action may be brought in the jurisdiction to which the holder of the fund *in medio* is subject, even though the claimants reside in other parts of Scotland or abroad.(k) In this case the petition is served on them in the same way as other writs are served on persons resident beyond the jurisdiction.

(g) *Connell's Trs. v. Chalk*, 6th March, 1878, 5 R. 735.

(h) *Robb's Trustees v. Robb*, 3rd July, 1880, 7 R. 1049.

(i) *Kyd v. Waterston*, 5th June, 1880, 7 R. 884.

(j) *Nimmo v. Murray*, 14th May,

1863, 1 M. 791.

(k) 39 & 40 Vict. c. 70, §§ 47, 12 (1); *North British Railway v. White*, 4th Nov. 1881, 9 R. 97. The warrant for service does not, however, need indorsement.

**2. Proceedings in Multiplepointing.**—The multiplepointing may be raised either by the holder of the fund or by one of the claimants ; and, as the holder stands as nominal pursuer in all cases, the petition must always tell who the real raiser is.(l) The defenders are the different claimants, so far as known to the raiser. If the pursuer be only nominally the raiser, the petition must be served on him also.(m) The condescendence specifies the amount or nature of the fund *in medio* ; and the prayer is, that the pursuer shall be declared to be only liable in once and single payment or delivery to those having right, and that he is entitled on payment, delivery, or consignation, to be exonerated, and to get his expenses. It concludes by asking that decree should issue in favour of the party or parties who shall be found to have the best right to the fund or subject *in medio*.(n)

Appearance may be entered in the usual way, but seems unnecessary where no defences are to be stated.(o) Claimants on the fund may appear though not summoned.

**3. Ascertaining the Fund in medio.**—On the cause being called, the first matter to be discussed is the existence and amount of the fund *in medio*. If the nominal raiser admits having it, and the other parties are satisfied with the statement of its amount contained in the condescendence attached to the petition, there will be no litigation on this point ; but if these things be in dispute, a record must be made up. If the nominal raiser disputes all liability to account to the real raiser or other claimants, then he lodges defences to the competency, and these must first be disposed of. Where he

(l) 39 & 40 Vict. c. 70, § 25.

(m) A. S., 10th July, 1839, § 102.

(n) 39 & 40 Vict. c. 70, sch. A.

(o) Connell v. Ferguson, 6th March,

1861, 23 D. 683. It would be impossible to dispose of the action by a decree in absence, the order for claims (*infra*) being imperative.



simply disputes the amount of the fund as stated in the petition, or where the petition contains no statement on that point, it would seem competent for him to give his account of what he has in his possession, also in defences, but the usual course in these cases is to order a condescendence of the fund *in medio* to be given in by him, and to allow the other parties if so advised to lodge defences. On this record the questions as to the fund *in medio* will be determined as in an ordinary action.(p)

**4. Order for Claims.**—On its being admitted or established that there is a fund *in medio*,—that is, in all cases where no defences have been stated, or where defences have been stated and repelled,—the next step is to find the pursuer liable only in single payment, and to order claims to be given in within a certain short space.(q) When the holder has no claim over the fund, he is frequently ordered to consign it at this stage; and if he does consign it, a decree exonerating him is pronounced, and he gets his expenses, and has no more concern with the process. If there be any doubt that all the possible claimants have been called by the petition, it is common at this time to advertise for claims, but there does not seem any power which would make it safe to substitute advertisement for citation to parties whose claims are known to exist, however convenient that might sometimes be.

**5. Record and Disposal of the Claims.**—Any number of claimants claiming on the same grounds may state their claims on the same paper.(r) The claim is called, technically, a condescendence and claim, and sets forth the grounds of the

(p) Sellar's Forms, p. 265.

Connel v. Ferguson, *supra*.

(q) 39 & 40 Vict. c. 70, § 25 (2);

(r) 39 & 40 Vict. c. 70, § 25 (3).

demand in the same way as in an ordinary condescendence. Pleas in law are added as usual, and then in a "claim" is stated the claimant's precise demand, much as he would state it in the conclusion of a petition. When the time for lodging claims expires, the Sheriff appoints the parties to meet him, and allows each to adjust his own claim and to meet the averments of his opponents in so far as necessary. It would seem also competent for him, in cases where it is requisite and when it was asked before the order to adjust is pronounced, to order the claims to be revised; and this is often a convenient course where parties require to answer the statements of the others. When it is apparent from the outset that answers will be requisite, they are sometimes ordered in the interlocutor appointing claims.<sup>(s)</sup> After adjusting, with or without revision or answers, as the case may be, the record is closed.<sup>(t)</sup>

Where the claims of parties are opposed, but they are agreed on the facts, they may, in place of the ordinary record, make their averments in the form of a joint case, appending thereto their respective claims and pleas in law.<sup>(u)</sup> Another useful power is that the Sheriff sometimes appoints a common agent where the interests of a number of claimants are or ought to be the same. The joint case is provided for by the Act of 1876, and the latter proceeding is provided for by the Act of Sederunt of 1839,<sup>(v)</sup> but neither is much used.

When the record of claims has been closed, their discussion and decision proceeds as in an ordinary action; and when a decision is pronounced in favour of any one of the claimants, those to whose interest it is adverse may appeal.

## 6. Late Appearance of Claimants.—An important feature

(s) Sellar's Forms, p. 265.

(u) *Ibid.* § 25 (3).

(t) 30 & 40 Vict. c. 70, § 25 (4).

(v) A. S., 10th July, 1839, § 104.

in multiplepoinding is, that claimants may appear at any stage. Even when they know of the proceedings—indeed, even when they have been called as defenders—the only penalty on not appearing till a late stage is to exact payment of such expenses as the Court thinks reasonable.<sup>(w)</sup> If, however, they do not appear till decree of preference has been or is about to be pronounced, they may not be admitted, and their only mode of protecting their interests will be by declarator.<sup>(x)</sup> The liberty of appearing late, however, does not entitle a party to reappear who has appeared and lodged a claim, but has neglected to go on with it. Such a party would be in the position of a defender who has lodged defences in an ordinary action; and he would be held bound by any decision pronounced in the case, subject to the discretion of the Court to repon him against it, as against a decree by default.

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#### XXI.—POINDING OF THE GROUND.

“Poinding of the ground” is a diligence, or action of execution, by which a creditor whose debt is heritably secured attaches the moveable effects, which are on the heritage,<sup>(a)</sup> so as to make them available in payment of principal, or interest, or arrears of interest. It is not very frequently used, as it is only in the comparatively rare event of the heritable property proving of less value than the amount of the debt secured upon it that a heritable creditor has any motive to assert his right to the

<sup>(w)</sup> *Jaffé v. Carruther*, 3rd March, 1860, 22 D. 936. *Anderson v. Hollebhone*, 3rd July, 1883, 20 S. L. R. 723.

<sup>(x)</sup> *Morgan v. Morris*, 11th March, 1856, 18 D. 797.

<sup>(a)</sup> *Urquhart v. Anderson*, 16th June, 1883, 20 S. L. R. 670.

moveables. The debt may be such a debt as is due by a feuar to his superior for feu-duties or casualties, or such as is contained in an ordinary heritable bond. It must be due by the owner of the heritage, though the fact of his not standing feudally vested in the property would not prevent the use of the diligence.(b) But, though the debt must be heritable, the immediate creditor's title to it need not itself be heritably completed: his title may be only personal, as that of an assignee to an heritable bond, or that of an executor to arrears of interest or feu-duties. The creditor must not be in actual legal possession of the heritage, because in that case he would be in the same position as if he were proprietor, and would have to exercise the rights which that position gave him. Thus, since a creditor who holds an *ex facie* absolute disposition qualified by a back letter, is for the time being in the position of proprietor, he cannot use the diligence.(c) On the other hand, so long as a creditor is not in possession as proprietor he can use it. Thus, one who has obtained a decree of mails and duties against the tenants is not thereby precluded from also using a poinding of the ground.(d) In regard to moveables left on the ground by a debtor whom a creditor has put out of possession, it would seem that they are secured without further diligence. By poinding the ground, goods of tenants are secured to the extent only of rents unpaid by them.(e) The goods of a third party which happen to be on the ground, or in the debtor's possession, cannot be taken at all.(f)

(b) *Mackenzie's Tra. v. Smith*, 26th Jan. 1883, 20 S. L. R. 351.

(c) *Scottish Heritable Security Co. v. Allan*, 14th Jan. 1876, 3 R. 333.

(d) *Henderson v. Wallace*, 7th Jan. 1875, 2 R. 272.

(e) *Campbell's Tra. v. Paul*, 13th Jan. 1835, 13 S. 237; and *Brown v. Scott*, 21st Dec. 1859, 22 D. 273.

(f) *Thomson v. Scoular*, 18th Jan. 1882, 9 R. 430; *Nelmes v. Gillies*, 30th May, 1833, 20 S. L. R. 596.

By the mere service of the petition the debtor's goods are so attached that he cannot dispose of them, and that any person taking them from him in the knowledge of the diligence acquires no right, even though value may have been given.<sup>(g)</sup> Sequestration under the Bankruptcy Acts renders any poinding of the ground, which has not been carried into effect by sale sixty days before it, unavailable in any question with the trustee, except for interest for the current half-yearly term.<sup>(h)</sup>

The petition concludes for warrant to poind the goods or other moveables on the ground, under the restriction that goods of tenants or occupants shall not be taken to the value of more than the rent or other prestations due by them.<sup>(i)</sup> Looking to the fact that the service creates a nexus, warrant to inventory the effects is sometimes prayed for, so as to preserve evidence of what has been attached.<sup>(j)</sup> The title of the pursuer is set forth, and the defenders called are the proprietor and the tenants or occupants of the land. If warrant to inventory have been granted, the petition must not be served postally, and, indeed, it is doubtful whether that kind of service should be used in any case. When the action is defended a record is made up in the usual way; but if the pursuer's right is *ex facie* good, the Sheriff cannot entertain objections to it founded on questions of heritable title<sup>(k)</sup> unless the value in dispute be within the limit—set by the Act of 1877<sup>(l)</sup>—of £50 by the year or £1000 in all. On decree being pronounced, the extract is a sufficient warrant to poind, without

(g) *Lyons v. Anderson*, 21st Oct. 1880, 8 R. 24.

(h) 42 & 43 Vict. c. 40, superseding *Dick's Trs. v. Whyte's Tr.*, 28th Jan. 1879, 6 R. 586, and *Royal Bank v. Bain*, 6th July, 1877, 4 R. 985.

(i) 1 Bell's Com. (5th ed.), p. 683; *Mackay's Practice*, vol. ii. p. 315.

(j) *Sellar's Forms*, vol. i. p. 241.

(k) *Ailsa v. Jeffray*, 15th Feb. 1859, 21 D. 492. Lord Deas' opinion in this case will be found to contain a valuable exposition of the law as it at present stands.

(l) 40 & 41 Vict. c. 50, § 8.

other precept or authority; and no charge is requisite.(m) The poinding in other respects proceeds in the usual way.

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Section XXII.—PROCEEDINGS UNDER THE POOR-LAW ACT.

Under section 73 of the "Act for the Amendment of the Laws relating to the Relief of the Poor,"(a) paupers who have been improperly refused relief may apply to the Sheriff for redress. The proceedings in such applications are regulated by Act of Sederunt.(b) The application may be made without the intervention of an agent, and either verbally or in writing. If the Sheriff is of opinion, upon the facts stated by the applicant, that he or she is not entitled to relief, a deliverance to that effect is pronounced; and against this deliverance there is the usual right of appeal. If the Sheriff, however, on those facts thinks the applicant entitled to relief, he makes an order directing the proper relieving officer to afford interim relief until, on or before a day fixed, reasons for the refusal are lodged. This interim order must be intimated by the Sheriff-Clerk; and if the reasons are not lodged, it is made permanent. Where reasons are lodged, the Sheriff (if required) nominates an agent for the applicant, and (if necessary) directs a record to be made up and proof to be led, and then pronounces judgment in common form, either finding the applicant entitled to relief, and ordaining the respondent to determine the amount, or finding that the applicant is not entitled to relief. The Sheriff determines only as to the

(m) *Kennedy v. Buik*, 17th Feb. 1852,  
14 D. 513. Lord Medwyn's opinion  
contains a full exposition of the mode

of enforcing the decrees.

(a) 8 & 9 Vict. c. 83, § 73.

(b) A. S., 12th Feb. 1846.

pauper's right to be relieved; the question of the amount to be given is for the parochial authorities, under the review of the General Board of Supervision. The interim order may be continued till final judgment, or discontinued, at the Sheriff's discretion. The causes are conducted on the same footing as if the poor person had been admitted to sue *in forma pauperis*; and, in respects other than those mentioned in this article, under the ordinary forms.

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#### Section XXIII.—RATES AND ASSESSMENTS, RECOVERY OF.

For the recovery of rates and assessments due to authorities other than the Crown, there are many provisions in statutes, which authorise the proceedings to be conducted in a summary manner.(a) By these statutes it is usually provided that, upon a certificate by the collector that the rates or assessments are due, the Sheriff shall issue a warrant for their recovery. When this course is taken, it seems to exclude all discussion of the merits in the Sheriff Court, as there is no common law power in an inferior court to use the remedy of suspending a charge, and the statutory power of suspension given by the Act of 1838,(b) does not seem to reach this case. If, however, the local authority proceeds, as it may do, by way of ordinary or small-debt action to recover the amount, the merits are open, and the Sheriff can decide whether the rate or assessment in question is legal.(c)

(a) 43 & 44 Vict. c. 19, § 97.

(c) *M'Tavish v. Caledonian Canal*

(b) 1 & 2 Vict. c. 119, § 19; *infra* Comrs., 3rd Feb. 1876, 3 R. 412.  
sect. xxvi.

The main peculiarity about the proceedings for recovery of rates and assessments is that, whether taken under the special statute or at common law, imprisonment is still competent. The Act which abolished imprisonment for civil debt,<sup>(d)</sup> exempted from its operation "rates and assessments lawfully imposed, or to be imposed;" and as the limit of £8, 6s. 8d., below which that remedy was incompetent for other civil debts, never applied to them, it may be used however small their amount may be.<sup>(e)</sup> The proceedings for imprisoning are the same as those already explained in connection with decrees *ad factum præstandum*.<sup>(f)</sup> The amount remaining due at the date of the imprisonment must be entered in the prison books;<sup>(g)</sup> and on payment of it, or on consignment of it with a magistrate where there is no one to receive payment, the debtor must be liberated.<sup>(h)</sup> He is entitled to aliment under the Act of Grace.<sup>(i)</sup> He can in no case be kept in prison longer than six weeks for the rates or assessments of any one year;<sup>(j)</sup> and there is a discretionary power in the Sheriff to liberate him at any earlier time should he surrender all his effects to his creditors to be dealt with in bankruptcy, under the Cessio Acts.<sup>(k)</sup>

(d) 43 & 44 Vict. c. 34, § 4.

(e) 5 & 6 Will. IV. c. 70.

(f) *Supra*, p. 380.

(g) *Garden v. M'Coll*, 13th Dec. 1826, 5 S. 123.

(h) *Forbes v. Alison*, 31st Jan. 1823, 2 S. (o.e.) 169.

(i) *Supra*, p. 383.

(j) 45 & 46 Vict. c. 42, § 5.

(k) 39 & 40 Vict. c. 70, § 26 (3).



## Section XXIV.—REMOVINGS AND EJECTIONS.

1. *Nature of Proceedings.*

## SOLEMN REMOVINGS.

2. *Ordinary Removings (Agricultural Subjects).*
3. *Ordinary Removings (Non-Agricultural Subjects).*
4. *Extraordinary Removings (Legal Irritancies).*
5. *Extraordinary Removings (Conventional Irritancies).*

## SUMMARY REMOVINGS.

6. *Removings from Houses.*
7. *Removings from Houses Let for less than a Year.*
8. *Obligation in Lease to Remove.*
9. *Removing on Letter of Removal.*

## EJECTIONS.

10. *Ejection as Enforcement of Removing.*
11. *Petition for Summary Ejection.*

**1. Nature of Proceedings.**—Removing is the process by which a tenant whose right to occupy heritable subjects has come to an end is warned to remove (so as to prevent the effect of the law of tacit relocation), and is ejected if he fail to attend to the warning. An ejection is the process by which a person who has no kind of right to occupy or remain longer in an heritable subject is ejected from it. These are the appropriate remedies where the person is in the actual possession of the land, and no other process can properly be used as a substitute for them.<sup>(a)</sup>

Removings are either ordinary or extraordinary,—“solemn” or summary. An ordinary removing is what occurs at the natural termination of the tenant’s rights, on the expiry of the time for which the subject was let; an extraordinary is what occurs when the tenant’s right is interrupted during the currency of the lease by a legal or conventional irritancy. A solemn removing is one in which an action of removing on forty days’ warning is required.

<sup>(a)</sup> *Supra*, p. 445 (as to interdicts).

All removings in which less formal proceedings are required are called summary, and they are of three kinds—(1) where verbal warning is enough; (2) removings under the Act of 1838,(b) for houses occupied for less than a year; and (3) under the Act of 1853, for cases where the tenant has signed an express or implied obligation to remove.

#### SOLEMN REMOVINGS.

**2. Ordinary Removings (Agricultural Subjects).—**In lands let for agricultural purposes the landlord, having duly given the statutory notice,(c) must raise an action of removing in such time as to leave an interval of at least forty days between the date of execution and the term of removal.(d) The petition is in the form provided by the Act of 1876, but should specially found on the Act of Sederunt of 1756.(e) It sets forth the titles of the pursuer and defender or defenders. Sub-tenants need not be called unless the tenant have power to sub-let, or the landlord have recognised them. The conclusions are: that the defender be decerned to remove at the term, under pain of ejection; and that, in case of opposing the summons, he be found liable in expenses. Sometimes expenses are also

(b) 1 & 2 Vict. c. 119.

(c) 46 & 47 Vict. c. 62, § 28. In leases from year to year, or for less than three years, notice must be given not less than six months, and in leases for three years and upwards, not less than one year nor more than two years before the termination. The form of notice is that provided by the 16 & 17 Vict. c. 80, described *infra*, art. 8.

(d) A. S., 14th Dec. 1756, § 2 (Alexander's Acts of Sederunt, first series

p. 76), amended by 16 & 17 Vict. c. 80, § 29. If there are two terms, one for land and the other for houses, the execution must be timed for the term which comes first. Formerly the time ran from the calling.

(e) Carruthers v. Stormont, 4th July, 1764, M. 13,868. It need not libel the Act of 1853, referred to in preceding note; Granger v. Gaile, 16th July, 185 19 D. 1010.

asked in the case of the defender not removing in terms of the decree.

If the defender enters appearance, he must, unless he can instantly verify a defence excluding the action, find caution for "violent profits," that is, for payment of all damages the landlord may suffer should the tenant keep possession longer than he has right to do so. If the defender fails to find this caution, decree of removal will be pronounced, but if he finds it, he may plead any defences he thinks relevant, and a record will be made up in the usual way, and the case decided. And even though he instantly verify the defence, a record should be closed so as to keep the case in form and preserve evidence of the ground of decision. It is a recognised rule that the tenant cannot dispute the title of the person from whom his own title is derived.(f)

When decree of removing is pronounced, it may be extracted within forty-eight hours.(g) The form of the extract (which is provided for by Act of Sederunt of 27th January, 1830) orders the tenant to remove on a charge of forty-eight hours at or after the term, under pain of ejection.

### 3. Ordinary Removings (Non-Agricultural Subjects).—

It is not altogether clear when an action of removing is required for subjects which are not agricultural. For such subjects as mills (not being within burgh), mines, and fishings, it seems indispensable to have a petition of

(f) *Dunlop v. Meiklam*, 24th Oct. 1876, 4 R. 11.

(g) A. S., 10th July, 1839, § 113. As decrees of removing are reviewed by suspension, the provisions as to extracting contained in the Court of

Session Act, 1868, § 68, as well as the modifications of those provisions made by the Act of 1876, § 32, seem inapplicable, but any question will be avoided if special leave be given. See *supra*.

removing ;(*h*) and whenever houses in the country have any extent of land attached to them, especially if they be let on lease, (*i*) it is not advisable to dispense with one unless the tenant has granted an obligation to remove. In other cases it seems that the notice to remove may be even verbal, provided that it be distinct, that it be given sufficiently long before the term to prevent tacit relocation, and that it be satisfactorily proved.

When a petition is used in the case of non-agricultural subjects, it is in the same terms as in the case of agricultural subjects, except that the Act of Sederunt of 1756 is not set forth. The practice of warning solemnly from non-agricultural subjects by a precept of warning from the landlord, under the Act of 1555, c. 39, is almost obsolete.

#### 4. Extraordinary Removings (Legal Irritancies).—

When the irritancy on which the currency of the time is interrupted is one caused by the operation of the law, as distinguished from one caused by virtue of the express terms of the lease, the Sheriff Court has no jurisdiction to remove, except in the cases in which the jurisdiction has been expressly given by the Act of Sederunt of 1756. In considering these two cases, it is necessary to distinguish between subjects in regard to which the landlord's right of hypothec still subsists, and those in regard to which that right has ceased and determined under the Hypothec Abolition Act of 1880. The right of hypothec ceased and determined under that Act for the rent of any land (including that of buildings thereon) exceeding two acres in extent, let for agriculture or pasture,

(*h*) Riddel *v.* Zinzan (mills), 21st Nov. 1671, M. 13,828; Gordon *v.* Burnet (fishings), 25th Feb. 1783, M. 13,859. As to mines, see Hunter on Landlord and Tenant, vol. ii. p. 86.  
(*i*) Compare *infra*, art. 6.

under any bargain, which was not current at 11th November, 1881.(j)

The first of the legal irritancies for which the Sheriff can remove occurs where the tenant has suffered two years' rent to be in arrear; and for this irritancy a removal is competent, whether the hypothec has or has not ceased and determined.(k) The petition concludes to have it declared that this irritancy has been incurred, and to have the tenant removed. It libels the Act of Sederunt of 1756, and proceeds in other respects like any ordinary solemn removing.(l) The tenant can purge the irritancy (that is, get leave to remain) if he pays the arrears at any time before extract.(m) Where the lease under which this irritancy occurs is longer than twenty-one years in duration, it appears to have been thought—probably on the ground that such a lease is of the nature of a right to property rather than of a right of possession(n)—that, notwithstanding the Act of Sederunt, the Sheriff Court had no jurisdiction; and accordingly a limited statutory jurisdiction was given by the Act of 1853 where the annual value of the subjects let did not exceed £25. The irritancy is the ordinary one of allowing two years' rent to run in arrear, and the mode of

(j) 43 Vict. c. 12.

(k) 46 & 47 Vict. c. 62, § 27, repealing 43 Vict. c. 12, §§ 2 and 3.

(l) A. S., 14th Dec. 1756, § 4. The notion that the tenant does not require to find caution for violent profits in such cases is not quite correct (*Cossar v. Home*, 8th Feb. 1847, 9 D. 617), though there may be cases where it can be dispensed with in the first stages, as, for example, if there be a *bona fide* dispute as to the existence of arrears (*Mackenzie v. Mackenzie*, 23rd May, 1848, 10 D. 1009), or, in cases brought for the second legal irritancy,

if the fact of desertion be denied (*Oliver v. Weir's Trs.*, 21st May, 1870, 8 M. 786).

(m) *Ballenden v. Argyle*, 6th July, 1792, M. 7252. If he fail to purge the irritancy before extract, even though the decree be in absence, the opportunity is gone; *Kennedy v. Allison*, 11th March, 1807, Hume, 578, and cases there cited; *Hunter, on Landlord and Tenant*, vol. ii. p. 139.

(n) Compare *Stirling v. Walker*, 20th Feb. 1821, F. C., and the cases cited for the pursuer.

enforcing it is, *mutatis mutandis*, the same as that for removing a vassal whose feu-duty is in the like position.(o)

The second legal irritancy under the Act of Sederunt of 1756 occurs where a tenant runs in arrear of one full year's rent, or deserts his possession, or leaves it unlaboured at the usual time of tilling. Proceedings under this irritancy are competent where the hypothec subsists, and in those cases also where it has ceased and determined, in which a removing for non-payment of rent is not competent under the provision of the Agricultural Holdings Act, immediately to be noticed. When thus competent, the landlord may, in any of the three cases named, bring an action calling on the tenant to find caution for the arrears, and for the rent for the five crops following, or till the end of the lease, if it ends sooner. In this action the Sheriff fixes a time for the tenant to find caution; and if it be not found, decree of removing is pronounced as in an ordinary removing.(p) This irritancy the tenant may purge in the same way as the one already mentioned.

Where the hypothec has been abolished, the landlord may, when six months' rent is due and unpaid, raise an action of removing, concluding for the removal of the tenant at the term of Whitsunday or Martinmas next ensuing after the action is brought. In this action the tenant must either pay the arrears, or find security to the Sheriff's satisfaction for them and for one year's rent further. The penalty of failure to do one of these two things is removal and ejection, as if the lease had determined, and legal warning had been given. A tenant so removed has the rights of an outgoing tenant.(q)

The legal irritancy incurred where the tenant does not

(o) 16 & 17 Vict. c. 80, § 32; Whyte  
v. Gerrard, 30th Nov. 1861, 24 D. 102.

(p) A. S., 14th Dec. 1756, § 5.  
(q) 46 & 47 Vict. c. 62, § 27.

stock his farm cannot be enforced in the Sheriff Court. The Sheriff can pronounce a decree ordering the tenant to stock his farm, but it seems that he cannot carry it out.(r)

### 5. Extraordinary Removings (Conventional Irritancies).

—Where the irritancy is conventional, it seems that the Sheriff may remove, because in that case the irritancy brings the lease to an end in virtue of its own terms, just as much as if the number of years specified in it had expired.(s) Thus, if the lease say that a tenant who becomes bankrupt is to remove, the landlord may, on that event happening, bring his action (founding upon the bankruptcy) before the Sheriff, and get the tenant put out;(t) but only, it seems, if the tenant be notour bankrupt,(u) because the Sheriff Court is supposed to be incompetent to investigate such a matter. A distinction has been attempted to be drawn between conventional irritancies which are penal and those which are not, with the view of giving the Sheriff jurisdiction in the latter case only; but the distinction is scarcely intelligible, for all irritancies are penal in any sense in which that word can be used in connection with them.(v)

### SUMMARY REMOVINGS.

**6. Removings from Houses.**—"Solemn" removings are not necessary for houses, even when in the country and when

(r) *Horn v. M'Lean*, 19th Jan. 1830, 8 S. 329; *M'Dougall v. Buchanan*, 11th Dec. 1867, 6 M. 120. *Supra*, p. 57.

(s) *Hunter on Landlord and Tenant* (4th ed.), vol. ii. p. 133, and authorities there cited; *Stewart v. Watson*, 20th July, 1864, 2 M. 1414.

(t) *Scott v. Wotherspoon*, 27th Feb. 1829, 7 S. 481.

(u) *Hog v. Morton*, 4th March, 1825, 3 S. 617.

(v) See *Rae v. Henderson*, 23rd Feb. 1837, 15 S. 653.

having gardens and ornamental grounds attached to them. Forty days' warning before the term must, however, be given to the tenant; but the warning may be verbal, provided it be satisfactorily proved. If the tenant does not move after the warning, he may be ejected on a summary petition to the Sheriff. Most of the cases where this summary kind of removal has been used appear to have related to tenements of small value, and to tenements where no written lease has existed; but both those considerations in the present matter must be immaterial, because the value cannot govern the matter, and a lease which has come to an end cannot raise any stronger presumption of tacit relocation than a tenure under a verbal agreement.<sup>(w)</sup> If the landlord thinks it right, there is no objection to his using a formal action of removing, as the expenses of the proceeding fall upon himself.

Within burghs, removings are usually conducted according to local customs, and under the direction of the burgh magistrates. For all burghs, including royal and parliamentary, and those constituted under the General Police Act of 1862, it is sufficient to send by registered letter a notice of removal, signed by the landlord, his agent, or factor, and handed in to any post-office in the United Kingdom in time to admit of its delivery at or prior to the last date when by law notice of removal may be given. In all such burghs the Whitsunday and Martinmas terms of removal are now 28th May and 28th November respectively, at twelve noon, unless these days fall

<sup>(w)</sup> *Slowey v. Robertson* (rent £2, 12s., lease verbal), 2nd Nov. 1865, 4 M. 1; *Chirnside v. Park* (rent £5, lease verbal), 8th March, 1843, 5 D. 864; *Ramsay v. Conheath* (manor-house), 18th Dec. 1630, M. 13,826; *Frendraught*

*v. Seaton* (tower and fortalice, with yard and parks), 14th July, 1699, M. 13,832; *Lundin v. Hamilton* (house in the country), 19th Dec. 1758, M. 13,845.



on a Sunday or legal holiday, when they are at the same hour on the first lawful day thereafter.(x)

### 7. Removings from Houses let for less than a Year.—

The Act of 1838 provides a summary mode of removing tenants from premises let for less than a year, where the annual value does not exceed £30.(y) The statute gives a form for the complaint.(z) The proceedings are conducted in the way used in the Small-Debt Court, with this difference, that though the defender does not appear, the Sheriff must proceed with the case as if he had appeared; and that if the defender appear before the decree has been carried into execution, he may get a further hearing upon payment of such expenses as the Sheriff may fix. The form of the decree is given in the statute, and it is provided that it shall be final, and not subject to review of any kind.

Where the defender appears and finds caution for violent profits, the case must be conducted in the ordinary manner. It is in the power also of the Sheriff, if he does not think the case suitable for being disposed of summarily, to order answers; and in that case also the action goes to the ordinary roll, and the defender, if the defence be not instantly verified, must find caution for violent profits.

**8. Obligation in Lease to Remove.**—Where any probative lease specifies a term of endurance, the lease, or an extract of

(x) 44 & 45 Vict. c. 39.

(y) 1 & 2 Vict. c. 119, §§ 8 to 14. Where the letting is for less than four months, a warning of at least one third of the whole period must be given, in the absence of special stipulation; 44 & 45 Vict. c. 39, § 4.

(z) As these proceedings are virtually in the Small-Debt Court, and are not begun on the ordinary roll (A. S., 1839, §§ 148 and 149), it is conceived that the form in the Act of 1876 should not be used.

it from the books of any court of record, has the same force and effect as an extract-decree of removing obtained at the instance of the landlord against the tenant, provided that certain conditions are complied with. (a) *Firstly*, previous notice, in terms of the Agricultural Holdings Act of 1883, (b) must be given to the party in possession before the expiration of the term, or, where the lease has separate terms for lands and houses, before the term which comes first. This notice is to be given by a sheriff-officer of the county in which the lands and heritages are situated, or by a messenger-at-arms, in the statutory form, (c) and is to be delivered to the party in possession, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post-office. This notice must (secondly) be proved either by a certificate in the statutory form, (d) indorsed by the officer on the lease or extract, and attested by a witness, or by an acknowledgment indorsed by the party in possession, or by his known agent on his behalf. *Thirdly*, the officer ejecting must have, in addition to the lease or extract, a written authority from the landlord, or from his factor or agent. *Fourthly*, the removal or ejectment must take place within six weeks from the expiration of the latest term of endurance.

A tenant threatened with ejection under these provisions may bring a suspension "in common form," that is, in the Court of Session.

**9. Removing on Letter of Removal.**—Where any tenant grants a letter of removal, either holograph or attested by a

(a) 16 & 17 Vict. c. 80, § 30.

(c) 16 & 17 Vict. c. 80, § 30, Sch. I.

(b) 46 & 47 Vict. c. 62, § 28, referred

(d) *Ibid.* Sch. J.

to *supra*, p. 482, note (c).

witness, in a form provided by the Act of 1853,(e) the letter has the same force and effect as an extract-decree of removing, and is a sufficient warrant to any sheriff-officer of the county within which the premises are situated to eject, provided certain conditions are complied with.(f) The *first* and *second* of those conditions are: that if the letter bears date more than six weeks before the term of removal, notice must be given and proved in the same way as under the preceding article; and the *third* is, that in like manner the ejection must be carried out within six weeks from the term.

The proceedings may be suspended in common form.

#### EJECTIONS.

**10. Ejection as Enforcement of Removing.**—The decree of removing, if not complied with, is carried into force by an ejection conducted by officers of Court, who have power for that purpose to open shut and lockfast places, and to remove all the tenant's goods and effects from the premises, using all the requisite force for that purpose. In all ejections, except those under the Act of 1838, a charge of forty-eight hours is given;(g) and under that Act the time for the charge, if any, is fixed in the decree.

**11. Petition for Summary Ejection.**—Petitions for ejections are presented against parties who have no legal right or title of any kind to possess the subjects, or whose right or title, if they ever had one, has been brought competently to an end. Sometimes the petition is called one of intrusion, where the

(e) 16 & 17 Vict. c. 80, Sch. K.

(f) *Ibid.* § 31.

(g) A. S., 27th Jan. 1830, Sch. C.;  
Alexander's A. S., p. 404.

defender has recently taken possession of the premises, but the proceedings are in substance the same. It is of the essence of such a petition that it contain an allegation that the possession of the respondent is vicious or precarious without any title.<sup>(h)</sup> The proceedings (*mutatis mutandis*) are much the same as in the process of removing, except that no charge is given on the decree.<sup>(i)</sup>

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#### Section XXV.—SEQUESTRATIONS FOR RENT.

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| 1. <i>Nature of Remedy.</i>                | 7. <i>Reporting Sale.</i>                                       |
| 2. <i>Sequestration in Payment.</i>        | 8. <i>Sequestration in Security.</i>                            |
| 3. <i>Form of Application.</i>             | 9. <i>Register of Sequestrations.</i>                           |
| 4. <i>Inventory of Effects.</i>            | 10. <i>Caveat or Interdict against</i><br><i>Sequestration.</i> |
| 5. <i>Proceedings if Petition opposed.</i> | 11. <i>Breach of Sequestration.</i>                             |
| 6. <i>Sale of Sequestrated Effects.</i>    |   |

**1. Nature of Remedy.**—A sequestration for rent is the means by which a landlord makes effects secured to him by his right of hypothec available in payment of the rent; and it is of two kinds. Sequestration in payment is used when the term of payment has passed with the rent unpaid, and sequestration in security is used when the term of payment has not come. Frequently the same petition asks sequestration in payment of a past due rent, and in security of a rent about to become due. The right to use the remedy has been materially curtailed by the Hypothec Abolition Act of 1880. Before that Act the landlord of every heritable subject possessed a

<sup>(h)</sup> *Hally v. Lang*, 26th June, 1867, 8 R. 737.

5 M. 951; *Scottish Property Investment Co. v. Horne*, 31st May, 1881,

<sup>(i)</sup> *Sellar's Forms*, vol. i. p. 256.

right of hypothec for his rent. Since that Act, there is no hypothec for the rent of any land (including the rent of any buildings thereon) which exceeds two acres in extent, and is let for agriculture or pasture, unless the rent be due under a bargain which was current at 11th November, 1881.(a)

**2. Sequestration in Payment.**—In agricultural subjects (where the hypothec did not cease and determine under the Act of 1880), the crop of each year is held to be hypothecated for the rent of that year; and it, along with the stock, is secured by the right of hypothec for three months after the last legal or conventional term of payment.(b) In house subjects the hypothec over the furniture lasts for the same period of three months. In sequestrating, therefore, it is only the crop of the particular year which can be touched; and the sequestration must be used while the right of hypothec lasts.(c)

**3. Form of Application.**—The application is by petition, setting forth the title of the applicant and of the respondent, the lease or other tenure under which the farm or house is held, the date at which the rent fell due, and the fact that it is still unpaid. The prayer asks the Court to sequestrate the effects on the premises in question, and to authorise an inventory of them to be made, and thereafter to grant warrant to sell them in payment of the rent and expenses.(d) The prayer

(a) 43 Vict. c. 12, § 1.

(b) 30 & 31 Vict. (1867), c. 42, § 4. When agricultural produce or stock has been sequestrated, furniture, implements, and imported manures cannot be included; *Ibid.* § 6.

(c) See Act of 1867 quoted, and Hunter on Landlord and Tenant, vol. ii.

p. 416. Under leases current at the date of the Act of 1867, the right of hypothec is more extensive, as the crop may be sequestrated at any time.

(d) 39 & 40 Vict. c. 70, Sch. A. The warrant must be signed by a Sheriff. It is plain that postal service is out of the question.

may also contain a conclusion for a decree of payment of the rent,(e) which it is sometimes useful to have. In special circumstances, to be set forth in the petition, the prayer may also ask for authority to bring back effects which have been illegally removed from the premises, as it is only to effects on the premises that the power to sequester extends.

**4. Inventory of Effects.**—Unless a caveat has been lodged, or an interdict obtained,(f) the Court sequesters and grants warrant to inventory at once on the petition being presented. Under this warrant an officer of Court, in presence of a witness, makes an inventory of the whole effects secured by the hypothec, and returns an execution signed by himself and the witness. This inventory must be specific, and, where the premises are large, should give the particular place where each article is found, so that there may be no difficulty in identifying it. The inventory measures the extent of the sequestration, and anything not specified in it is not sequestered.(g)

**5. Proceedings if Petition opposed.**—Where the defender opposes the sequestration, he must enter appearance in the usual way. If he find caution for the rent, or consign it, the

(e) A. S., 10th July, 1839, § 151; 16 & 17 Vict. c. 80, § 27. Indeed, under the new forms, by which an ordinary action and a sequestration for rent both begin by a petition of the same kind, there seems no reason why a claim for any kind of debt, or for interdict, should not be combined with a prayer for sequestration.

(f) *Infra*, art. 10.

(g) *Horsburgh v. Morton*, 26th Feb.

1825, 3 S. 596. As an exception to this, is the case of sequestering a pregnant animal, where it has been held that the offspring is included, though not specified; *Lamb v. Grant*, 16th July, 1874, 11 Scot. Law Rep. 672. This case was decided partly on the authority of the Civil Law. Full references will be found in *Puchta Pandekten*, §§ 203, 215.

interim-sequestration will be recalled; and it will also be recalled as soon as it is made to appear that it is illegal. When the litigation goes on, a record is made up in common form. Where the sequestration has been recalled on caution, decree for payment of the rent and expenses incurred may be given against the tenant, and enforced against him and the cautioner; <sup>(h)</sup> and where it has been consigned, payment may be given out of the consigned money.

**6. Sale of Sequestered Effects.**—Where the sequestration is unopposed, or not successfully opposed, a warrant to sell is granted. This warrant may be given after the three months are out, provided the effects have been inventoried within the three months. The sale is by public roup, and takes place at the sight of the Clerk of Court or of some person appointed by the Sheriff, <sup>(i)</sup> and either the Sheriff, or the person appointed to see to the sale, fixes its time and place, and provides for its being duly advertised. Goods should be sold to the extent only of the rent and expenses; but it will be no objection that there is a small surplus. <sup>(j)</sup>

**7. Reporting Sale.**—Immediately on the sale being concluded, or at latest within fourteen days thereafter, the roup roll, or a certified copy of it, and a state of the proceeds and expenses of the sale (showing how the debt stands), must be lodged in the hands of the Clerk; and the Sheriff, if he see cause, or on motion, may order the gross proceeds to be consigned. The accounts are taxed by the auditor; the report of

(A) *Clark v. Duncan*, 3rd Dec. 1833,  
12 S. 158.

(j) *Galloway v. M'Pherson*, 16th  
Feb. 1830, 8 S. 539.

(i) A. S., 10th July, 1839, § 150.

the sale is approved of by the Sheriff; and any balance remaining over is paid back to the tenant.(i)

**8. Sequestration in Security.**—Before the term of payment, if the tenant be either in embarrassed circumstances, or be removing the stock and crop so as to endanger the rent, the landlord may sequester in security, and the proceedings in this case are similar to those in a sequestration for payment, except that warrant to sell cannot in general be granted till after the term of payment. Where, however, the effects are perishable, and the tenant is bankrupt, and is allowing them to perish for want of care, or is making away with them, warrant to sell may be granted at once.(k) The Sheriff may also appoint a person to take charge of the sequestered effects(l) where the tenant does not offer caution to make them forthcoming.

The remedy of sequestration in security is one which the landlord is entitled to obtain whenever he asks for it upon grounds which are relevant. If he uses the remedy “wrongfully,” he is liable in damages.(m) It is also a remedy which, as a rule, the landlord has to take at his own cost. Thus, if the rent be paid when due, he must pay the expense of the sequestration, though he had ground (such as the existence of arrears) for laying it on at the time.(n)

**9. Register of Sequestrations.**—Under the Hypothec Amendment Act of 1867, the Sheriff-Clerk is bound to keep

(k) *Dow v. Hay*, 25th June, 1784, M. 6202; *Wells v. Proudfoot*, 12th Feb. 1800, Hume, 225.

(l) A. S., 10th July, 1839, § 152. The power is applicable to any sequestration.

(m) *Oswald v. Græme*, 26th June, 1851, 13 D. 1229; *Watson v. McCulloch*, 1st June, 1878, 5 R. 843.

(n) *Gordon v. Suttie*, 11th June, 1836, 14 S. 954.



a register of all sequestrations issued, and to show it to any one applying on payment of a fee of one shilling.(o) The landlord should ascertain that this registration is duly made, as the validity of the sequestration may be questioned if it be neglected.

**10. Caveat or Interdict against Sequestration.**—Where a tenant has reason to believe that sequestration is about to be used against him illegally, he may lodge a caveat which will ensure him an opportunity of being heard before the warrant is issued. When he wishes the question at issue between himself and the landlord settled without waiting till the latter chooses to move, he can apply for interdict. In both cases the landlord's right to sequester will not in general be interfered with, except on caution or consignment.(p)

Where a third party complains that his goods have been improperly included in the inventory, his remedy is to crave leave to appear in the sequestration, and to state objections to the warrant of sale being granted. So long, at all events, as that warrant has not been granted, it is irregular and unnecessary, if not absolutely incompetent, to proceed in the more expensive way of applying for interdict.(q)

**11. Breach of Sequestration.**—If the tenant removes or sells the sequestrated effects, he is liable to be summarily fined and imprisoned for breach of sequestration. It hardly requires to be said that he is also liable for all loss and damage he may occasion. Any who knowingly assist him in

(o) 30 & 31 Vict. c. 42, § 7. The obligation to register applies also to sequestrations under the Small-Debt and Debts Recovery Acts.

(p) Hunter on Landlord and Tenant, vol. II. p. 428.

(q) *Lindsay v. Wemyss*, 18th May, 1872, 10 M. 708. In this case an opinion was expressed that such objections fell properly to be dealt with by the Sheriff in the first instance.

these things render themselves liable, not only to summary punishment in the same way, but also in payment of the rent. It is not, however, a breach of sequestration if the tenant merely use such of the sequestered effects as are required for the sustenance of his servants,<sup>(r)</sup> or of sequestered animals,<sup>(s)</sup> even though the effects be consumed in the using. And where the tenant is in *bona fides* in what he does, he will not, even though he break the sequestration, be liable to any arbitrary punishment. Thus, where a tenant thought that, in accordance with the general custom in his county, a certificate by the clerk of caution having been lodged was a sufficient recall of a sequestration, and acted accordingly, he was held not liable in punishment.<sup>(t)</sup>

Where a petition for breach of sequestration prays for penal consequences, the concurrence of the public prosecutor should be obtained, as in the case of a petition for breach of interdict, and the proceedings follow the same course.

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#### Section XXVI.—SUSPENSION.

Suspensions of the decrees obtained under the summary diligence system in use in Scotland are competent to a limited extent in the Sheriff Court. Where a charge has been given on any decree of registration (which has proceeded upon a bond, bill, contract, or other form of obligation, registered in any Sheriff Court books, or in the books of Council and Session, or other competent books), for payment of any sum of

(r) *M'Glashan v. Atholl*, 29th June, 1831, 9 S. 792.

1819, F. C.

(t) *Kippen v. Oppenheim*, 30th June,

(s) *Miller v. Paterson*, 23rd June, 1846, 8 D. 957.

money not exceeding the sum of twenty-five pounds of principal exclusive of interest and expenses, a suspension may be brought in the Sheriff Court.<sup>(a)</sup> It will be observed that the power here is very limited, and applies only to the case of a charge for payment having been given, and of the amount charged for not exceeding twenty-five pounds, exclusive of interest and expenses.

The application must be made to the Sheriff Court of the domicile of the person charged. It cannot be made except on sufficient caution ;<sup>(b)</sup> but suspension seems always to be competent on that being found, although in most other kinds of suspensions consignation is requisite either at common law or under the obligation on which the decree has followed. Before a sist can be granted the caution must be found for the sum charged for, and for the interest and expenses to be incurred in the Sheriff Court. On this caution being found, the Sheriff has power to sist execution against the petitioner, to order intimation of the petition, and answers, and thereafter to proceed with the petition in the same manner as in the case of other summary petitions.

The sist should be immediately intimated to the charger. If he does not reside within the county, the order should be endorsed by the Sheriff-Clerk of the county where he does reside. If he lives out of Scotland, the intimation should be made to the mandatary, or other person in this country at whose instance the diligence is being carried out, for, although this may not be complete legal intimation, it would not be safe after this for the holder of the decree to go further.

(a) 1 & 2 Vict. c. 119, § 19.

(b) What is called "Juratory" caution must be held to be insufficient. It is a kind of caution only allowed

(under special authority) when sufficient caution cannot be got. See *Brown v. Denholm* (Glasgow Sh. Ct.), 1874, 18 *Journal of Jurisprudence*, 448.

Appeals from Sheriff-Substitute to principal Sheriff may be taken in suspensions in the usual way. There is a provision that the decision of the latter, on any preliminary objection to the competency or regularity of the petition, shall be final. This provision, however, it will seldom be necessary to found upon, because nearly everything to which it could apply is more stringently guarded by the provision of the Act of 1853,(c) prohibiting all review of decisions in causes not exceeding the value of twenty-five pounds.

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#### Section XXVII.—TAXATION OF AGENTS' ACCOUNTS.

The Act of Sederunt of 1839 provides simple machinery for taxing accounts between agent and client in certain cases. The provision applies only to accounts incurred in reference to actions, and where the client, moreover, does not dispute his liability. The agent or client may present a summary application to the Sheriff before whom the cause depends or depended, for authority to have the account taxed. This is intimated on a service of at least seven days, and then the account is remitted to the auditor and taxed; and each party can object to the taxation, or appeal against the Sheriff's judgment, as in an ordinary action. On the amount of the account being ascertained, decree for it may be given, extracted, and enforced in the usual way.(a) The expenses of the taxation in the similar proceeding in the Court of Session are allowed to the agent, unless there has been struck off a large amount—that is, an amount of one-fifth or more—from the

(c) 16 & 17 Vict. c. 80, § 22.

(a) A. S., 10th July, 1839, § 110.

account.(b) It is presumed that the same rule should be followed in the Sheriff Court.

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#### Section XXVIII.—RECOVERY OF TAXES.

Taxes due to the Crown are for the most part recovered by summary warrant issued upon the certificate of the collector in the manner already explained with reference to rates and assessments.(c) They may also be recovered by ordinary action. Under the decree for them, in whichever way obtained, imprisonment is still competent, but the period of it must not exceed twelve months.(d) The Crown seldom makes use of the powers to imprison, but when it does, the special statute under which the particular tax is due must be consulted as to the mode of using the remedy.

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#### Section XXIX.—ACTION OF TRANSFERENCE.

The action of transference is the means by which the representative of a deceased pursuer or defender, who will not sist himself, is forced to appear and pursue or defend the action to which his ancestor has been a party. The petition sets forth what the original action was, and the capacity in which the person who is called represents the deceased. The prayer is that the representative, in the case of a pursuer, shall be ordained to appear and proceed with the cause, and, in the case of a defender, shall be decerned against in terms of the

(b) Mackay's Practice, vol. ii. p. 600.

(d) 43 & 44 Vict. c. 34, § 4.

(c) *Supra*, p. 479.

original conclusions. The action cannot be raised in the Sheriff Court unless the Sheriff before whom the original cause depended has jurisdiction over the representative also.<sup>(e)</sup> If this Sheriff has no jurisdiction over him, the action must be raised in the Court of Session. It would be of no avail to raise it before the Sheriff to whose jurisdiction the representative was liable, because there would be means of remitting the original action to that Court.

In the action of transference, the only question discussed is the competency of transferring ; and that, when disputed, is disposed of as in an ordinary action. Should the Court decide to transfer, the action of transference is remitted to, or conjoined with, the original action, which is then proceeded with. Should the transference be in the Court of Session, the original action must be removed there by appeal *ob contingentiam*.

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Section XXX.—TUTORS AND CHOOSING CURATORS.

1. *Choosing Curators.*
2. *Curatorial Inventories.*

3. *Act of Curatory.*
4. *Tutorial Inventories.*

**1. Choosing Curators.**—Where the father of a minor above the age of puberty has died without naming curators, the minor may choose them. In order to do this, the minor raises an edict of curatory, in which he or she calls two of the nearest-of-kin on the father's side, and two on the mother's side, and all others having interest, to hear and see the curators chosen and the curatorial inventories given up.<sup>(a)</sup> The

<sup>(e)</sup> See *Cameron v. Chapman*, 9th March, 1838, 16 S. 907, and authorities were cited.

<sup>(a)</sup> 1555, c. 35 ; *Wallace v. Kennedy*, 29th July, 1674, M. 16,290.

edict is now drawn in the form of an ordinary petition. The next-of-kin are named individually, and cited in the usual manner; and the "others having interest" are cited edictally.(b) The summons is brought in the Sheriff Court within whose jurisdiction the minor resides; and if it has to be served on persons beyond the jurisdiction, it must, of course, be duly indorsed.(c) If all the next-of-kin are out of Scotland, application must be made to the Court of Session.(d) The petition used to proceed on an *induciae* of nine days, but may now proceed on the ordinary *induciae*.(e) On the summons being called in Court, the minor may appear and make choice of one or more parties to be his curators, whose appointment he may make simple or joint, with a *sine quo non* or a quorum, conditionally or unconditionally.(f) The minor may also make his nomination by a probative deed, and in this case he does not require to appear personally. The curators next accept the office (in writing), and take the oath *de fidei administratione*. If they be not present, a commission may be granted to take their acceptance and oath. Usually the next-of-kin do not appear, but when they do appear the proceedings are the same.

**2. Curatorial Inventories.**—The next step is for the curator to give up an inventory of all the property of the minor. If the next-of-kin have appeared, they appoint a delegate to

(b) 1555, c. 35. The edictal citation was formerly given at the market cross, but that method being abolished, it must now be given in the ordinary way; 39 & 40 Vict. c. 70, §§ 9 and 12 (6).

(c) *Burnet v. Burnet*, 1685, M. 16,306; 1 & 2 Vict. c. 119, § 24.

(d) This seems unavoidable from the

want of jurisdiction. The Court of Session may, however (in the application), dispense with the citing of next-of-kin who are abroad; *Euchan*, 7th June, 1873, 11 M. 662.

(e) 39 & 40 Vict. c. 70, § 8.

(f) *Fraser on Parent and Child*, by Cowan, p. 358.

concur with the curator in making up the inventory, and when they do not appear, the Court appoints a delegate to concur for them. On the inventory being made up, three copies are prepared and lodged by the curator. One copy is set aside for the next-of-kin, the second is recorded in the books of Court, and the third is given back to the curator.

**3. Act of Curatory.**—When these things are completed, an act of curatory is extracted, and the curator is then fully installed in his office. The curator thus appointed acts both in lawsuits and in ordinary business. Where there are no such curators, the Court may always appoint a curator *ad litem* to act in any particular action which is depending.(g)

**4. Tutorial Inventories.**—Although tutors cannot be appointed, they may give up the tutorial inventories in the Sheriff Court in a manner similar to that used by curators. When the inventories are prepared, and have been signed by the two nearest-of-kin on each side, they are presented (along with a petition to the Sheriff) for authority to record. Where the next-of-kin have refused to concur, the petition is served on them, and calls on them to see the Sheriff name delegates to sign for them ; and, unless cause is shown to the contrary, the Sheriff exercises that power.

(g) The forms will be found in Sellar, vol. I. p. 132.



**PART IV.**

**SMALL-DEBT AND DEBTS-RECOVERY COURTS.**

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**CHAPTER I.**

**SMALL-DEBT COURT.**

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| <ol style="list-style-type: none"><li>1. <i>Jurisdiction.</i></li><li>2. <i>Nature of Proceedings.</i></li><li>3. <i>Small-Debt Circuits.</i></li><li>4. <i>Agents in Small-Debt Courts.</i></li><li>5. <i>What Actions Competent.</i></li><li>6. <i>Ordinary Actions.</i></li><li>7. <i>Summons.</i></li><li>8. <i>Citation.</i></li><li>9. <i>Arrestment in Security.</i></li><li>10. <i>Decree in Absence of Defender, and Reponing.</i></li><li>11. <i>Absolvitor in Absence of Pursuer, and Rehearing.</i></li><li>12. <i>Remits from the Ordinary Court.</i></li><li>13. <i>Remitting to Ordinary Court.</i></li></ol> | <ol style="list-style-type: none"><li>14. <i>Counter Claims.</i></li><li>15. <i>Hearing and Evidence.</i></li><li>16. <i>Judgment and Decree.</i></li><li>17. <i>Extract.</i></li><li>18. <i>Execution.</i></li><li>19. <i>At whose Instance.</i></li><li>20. <i>Execution beyond County or Scotland.</i></li><li>21. <i>Poinding and Sale.</i></li><li>22. <i>Breach of Poinding.</i></li><li>23. <i>Arrestment in Execution.</i></li><li>24. <i>Furthcoming.</i></li><li>25. <i>Multiplepoinding.</i></li><li>26. <i>Sequestrations.</i></li></ol> |
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**1. Jurisdiction.**—The Small-Debt Court is for the summary disposal of causes for the payment or distribution of sums of money not exceeding the amount of £12. In the original Small-Debt Act of 1825 the limit was £5, which was extended by a new Act, in 1829, to £100 Scots. This

Act repealed that of 1825.(a) When the Act of 1837 (which is the present Small-Debt Act) was passed, the Act of 1829 was repealed, and various improvements were made in the forms, but the jurisdiction remained at £8, 6s. 8d.(b) In 1853 it was extended to £12.(c) From some expressions in the Act of 1837 it probably was intended that the jurisdiction should also apply to disputes about things other than money, of less than the value in question, but the intention has not been carried out. In the Small-Debt jurisdiction the Sheriff is not exercising a statutory jurisdiction where his whole powers are contained in the Statute, but he is exercising the full powers of his ordinary jurisdiction with certain additional facilities conferred by the statute.(d) It is important to bear this in mind when cases occur for which the Statute has not specially provided.

**2. Nature of Proceedings.**—The proceedings are of a summary kind. There are no written pleadings except the summons; the evidence is not reduced to writing, and the orders of Court are not written at length in interlocutor sheets, as in ordinary causes, but are shortly minuted in a book signed each court-day by the Sheriff. A form of this book is provided by the Statute, and it is the only record retained in the Court.(e)

Certain court-days are usually appointed for calling the

(a) 10 Geo. IV. c. 55.

(b) 1 Vict. c. 41. The power which this Act gave of prosecuting for statutory penalties in the Small-Debt Court has been extinguished; 44 & 45 Vict. c. 33, § 3.

(c) 16 & 17 Vict. c. 80, § 28.

(d) See *Scott v. Letham*, 22nd May, 1846, 5 Bell's Ap. Ca. 126 (quoted

*infra*); and *Fraser v. Mackintosh*, 19th Dec. 1867, 6 M. 170. None of the sections of the Act of 1876 seem applicable to the Small-Debt Court; see § 2. The Act of 1877 seems applicable; *Wilson v. Glasgow Tramways Co.*, 22nd June, 1878, 5 R. 981.

(e) 1 Vict. c. 41, § 117.

Small-Debt roll, but these are for convenience only, and a case may be adjourned to any other day.(f) The Table of Fees must be printed and hung up in the court-room.

**3. Small Debt Circuits.**—For the Small-Debt Courts the counties or Sheriff Court districts are sub-divided into smaller districts, and Circuit Courts are held in each at different periods in the year. These divisions are made for convenience sake. It was at one time thought that it was imperative on the pursuer to bring his action in the district in which the defender was domiciled, unless where he got leave from the Sheriff, on special cause shown, to bring it in another district. But this reading seems incorrect, and has been decided to be so.(g) The clause of the Statute governing the matter is somewhat obscure, but the pursuer has his choice to bring the action either in the principal Court or at the Circuit Court in which the defender resides. If there be different defenders residing in different circuits the case must be brought in the principal Court.

The Sheriff may at any time remove causes from any one Court to any other, or, on special cause shown, allow the summons to be issued in a different Court from that to which it would naturally fall. This special cause may be shown either in writing lodged with the Sheriff-Clerk or on verbal application in open Court; and it is enough if it be shown that the course proposed will be expedient for the ends of justice.(h)

**4. Agents in Small-Debt Courts.**—Agents are not allowed to appear in the Small-Debt Court except with the special

(f) *Weatherstone v. Gourlay*, 13th April, 1860, 8 Irvine, 589. 1868 (Aberdeen Circuit), 1 Couper, J. C. 92.

(g) *M'Gregor v. Stewart*, 23rd Sept. (h) 1 Vict. c. 41, § 23.

leave of the Sheriff, to be obtained (before the action is heard) on cause shown, and to be recorded in the Book of Causes. The parties must appear in all ordinary cases by themselves, or by a member of their family, or by such other person (not being an officer of Court), as the Sheriff may allow.<sup>(i)</sup> When agents do appear, there is no provision for making their remuneration a charge in the cause. The Statute may have intended that a party desiring the assistance of an agent, and showing cause for obtaining it, should, nevertheless, have it at his own cost only, and this view is supported by its having been anxiously provided that no other fees are to be taken or allowed except certain specified fees. Another view, however, is taken in some Courts, and when leave has been duly given for agents to appear, moderate fees, fixed at the discretion of the Sheriff, are allowed. When cases are remitted from the Ordinary to the Small-Debt Court, it is usual to allow the expenses of agents, and the fee to be allowed for all the trouble in the Small-Debt Court is fixed by Act of Sederunt at one pound.<sup>(j)</sup>

**5. What Actions Competent.**—There are four actions competent in the Small-Debt Court—viz., the Ordinary or Petitory Action, the Action of Furthcoming, Multiplepoundings, and Sequestrations for Rent. The special proceedings under the Employers and Workman Act, 1875, have been noticed.<sup>(k)</sup>

**6. Ordinary Actions.**—The petitory action may conclude for payment of a sum of money, due on any kind of claim, competent in the Ordinary Court, not exceeding the value of £12. There is a provision that claims for compensation for

(i) 1 Vict. c. 41, §§ 14 and 15.

(j) A. S., 4th Dec. 1878, Sch. IV.

(k) *Supra*, Part III. Chap. II. section ix.

injury by riot may be settled under it.<sup>(l)</sup> It is the value of the claim at the date of bringing the action which is the standard. If it be over £12 it may be restricted to that amount, the pursuer being held to have abandoned the rest of his claim.<sup>(m)</sup> The expenses of bringing or conducting the action are not included.

If a pursuer have several distinct claims against a defender, each not exceeding £12, he may bring separate actions for them, though the total of the claims may exceed £12.<sup>(o)</sup> When the defence brings out a question of more than £12 in value, it has been said that it is the Sheriff's duty, if asked, to remit to the ordinary roll.<sup>(p)</sup> But as such a defence is not considered to be brought out by showing (as in a case of aliment) that the pursuer's claim cannot be substantiated except upon a ground which (if good) infers liability for a much larger sum than that sued for,<sup>(q)</sup> it is very difficult to say when this duty arises, and there is no safe criterion of the value of the action except the sum sued for.

**7. Summons.**—The form of summons is provided by the Statute.<sup>(r)</sup> It is a survival of the form which before 1876 was used in all pecuniary actions, and its style is even more quaint than that of the petition now in use in the ordinary Court. The origin of the debt or ground of action, and whenever possible the date of the cause of action or last date in the account, must be inserted. The summons must of course be

(l) Small-Debt Act, § 22.

(m) Items disallowed by the Sheriff are deducted from the original claim, and not from the restricted sum sued for; *Dalglish v. Anderson*, 22nd Feb. 1883, 20 S. L. R. 412.

(o) *Fraser v. Ferguson*, 21st April,

1870, 42 Jurist 396.

(p) *M'Kendrick v. Robertson*, 14th Dec. 1870, 9 M. 283.

(q) *Caldwell v. Nixon*, 1st June, 1876, 3 R. (J. C.) 31. See also *Guthrie's Select Cases*, p. 417.

(r) Act, Schedule A.

relevant, and the ground of action shown in some way;(s) though it need not be stated at length or in detail.(t) An account founded on need not be annexed, but must be referred to in the summons by its amount and last date,(u) and a copy must be served on the defender. There is nothing to prevent a Small-Debt summons from being amended, with the permission of the Sheriff.(v)

The summons must have printed on it the Small-Debt Table of Fees, and a Sheriff-Clerk issuing a summons without that table is liable to a fine.(w)

**8. Citation.**—The rules as to citation are with certain exceptions the same as in the Ordinary Court, and the defender is called to appear at a specified Court, which must not be sooner than the sixth day after citation. No witness is required to the citation; and the citation may be proved either by an execution, or by the officer on oath in Court,(x) or in the manner provided by the Postal Citation Act.(y) The provisions as to citation made by the Sheriff-Court Act of 1876

(s) A decree for damages in transit obtained on a summons for goods sold, was set aside; *Glasgow & South-Western Railway v. Wilson*, 5th May, 1855, 2 Irv. 162.

(t) A summons on an account for a year's medical attendance, detailing neither visits nor specific charges, was sustained; *Mowat v. Martine*, 20th June, 1856, 2 Irv. 435. "To goods," with date and price, is sufficient specification; *Cox v. Jackson*, 16th June, 1877, 4 R. 8.

(u) See *Aitken v. Learmonth*, 27th April, 1855, 2 Irv. 156, where it was held to be no objection to a summons that it gave no statement of the origin of the cause of action otherwise than by a reference to an account indorsed on

the summons, but forming no part of it.

(v) *Sturrock v. Anton*, 20th April, 1866, 5 Irvine, J. C. 234; cases cited, *supra*, p. 506, note (d). In the Glasgow Sheriff Court I understand that the Sheriffs do not think themselves entitled to grant permission to amend.

(w) Small-Debt Act, § 33.

(x) Act, § 3. The forms of citation and execution are contained in Schedule (A). 34 & 35 Vict. c. 42 (Citation Amendment [Scotland] Act), § 4, makes it unnecessary for the officer to be accompanied by any witness or concurrent in any case in the Small-Debt Court or proceeding therein except in cases of pointing, sequestrating, or charging.

(y) 45 & 46 Vict. c. 77.

seem unfortunately to be applicable to the Ordinary Court only,(z) but their possible sphere of applicability to Small-Debt actions would in any case not be wide.

The exceptional cases, where more than the ordinary requisites of service must be attended to, occur (1) when the citation is affixed to the gate or door, and (2) when it is left with an inmate, the defender having removed within the forty days. In these cases it is the duty of the officer, over and above the usual citation, to make diligent search for the defender's address, and to send him by registered letter a copy of the summons, complaint, warrant, or other writ. The post-office receipt for the registration must accompany the execution, and the circumstances preventing service in the usual way must be stated.(a)

**9. Arrestment in Security.**—Arrestment on the dependence may be used, and the form of summons contains a warrant to that effect.(b) There is a speciality that under a Small-Debt summons wages cannot be arrested at all on the dependence.(c) It is also provided that arrestments cease and determine on the expiry of three months, unless they be renewed by special warrant or order duly intimated to the arrestee, or unless a furthcoming or multiplepoinding have been brought.(d) The Act also contains provisions and forms for loosing arrestments on the dependence. The loosing may either be on caution (found to the satisfaction of the Sheriff-Clerk) or on consignment of the claim, with certain sums for expenses.(e)

(z) 39 & 40 Vict. c. 70, § 12 and § 2.

(a) 34 & 35 Vict. c. 42, § 3.

(b) Small-Debt Act, § 3. Where the schedule is not served personally, it would be as well—*ob majorem cautelam*

—to send a copy per registered letter ;  
Act of 1876, § 12 (5).

(c) 8 & 9 Vict. c. 39.

(d) Small-Debt Act, § 6.

(e) *Ibid.* § 8.

**10. Decree in Absence of Defender, and Reponing.—**

If the pursuer appear, and the defender be absent and unrepresented (art. 4), decree in absence may be pronounced, unless sufficient cause shall be shown for the non-appearance, in which case the Sheriff may adjourn the hearing.(f) The decree in absence may be opened up on the defender consigning with the clerk the expenses decerned for, and ten shillings to meet further expenses. This must be done either before any charge has been given, or, if after a charge, before implement, or before three months' delay, have followed the charge. What implement prevents reponing has already been considered.(g) If there be no objection to reponing, the clerk (on the consignation being made) issues a warrant which (on being intimated) sists execution till next court-day, and gives authority to cite the pursuer and witnesses and havers for both parties to appear then. This warrant, duly served, is the authority for rehearing the case. The consigned expenses must be paid over to the pursuer, unless the Sheriff see fit to order otherwise.(h)

There is considerable doubt as to the competency of a second reponing. In Lanarkshire such a thing has been held incompetent,(i) while in Aberdeenshire it has been held competent, not as matter of right to the litigant, but as matter of discretion for the Sheriff, to be exercised upon strong cause shown.(j) In any view there can be little question that a third reponing is entirely incompetent.

(f) Small-Debt Act, § 15.

(g) *Supra*, p. 142.

(h) Small-Debt Act, § 16.

(i) *Harris v. Connell*, 18th Sept. 1877; *Guthrie's Select Cases*, 419.

(j) *Stuart v. M'Bey* (Debt-Recovery Court), 1882, unreported. There is difficulty in carrying out this view com-

pletely, as the sist is granted by the clerk before the Sheriff is consulted. In the Ordinary Court the question can hardly arise, as the first decree in absence is not recalled till defences are tendered; and, after they are received, subsequent decrees are *in foro*.



If the defender, after appearing in the action, fail to appear at any adjourned diet, and decree be taken against him, it still seems to be a decree in absence, although it is not what is usually understood when that term is used. There being, however, no provision in the Small-Debt Court for any record, no defences are ever lodged, and therefore the step which in ordinary actions ends the competency of pronouncing a decree in absence, and makes it competent to pronounce a decree by default, is never taken.<sup>(k)</sup>

#### 11. Absolvitor in Absence of Pursuer, and Rehearing.—

Where the pursuer fails to appear personally or by a proper representative, the defender may get decree of absolvitor in absence.<sup>(l)</sup> The pursuer has a limited time after this within which he may apply to have the cause reheard. If within one calendar month after the absolvitor he consign with the clerk the expenses awarded to the defender, and five shillings for further expenses, he may obtain a new warrant for citing the defender and the witnesses to another Court; and on this the case is reheard. The expenses consigned are paid to the defender unless the contrary be specially ordered.<sup>(m)</sup>

This provision ought to be equally applicable to the case of a pursuer failing to appear at an adjourned diet.

**12. Remits from the Ordinary Court.**—Cases may come to the Small-Debt Court from the Ordinary Court. Where an action is brought in the Ordinary Court for a sum not exceeding £12,

<sup>(k)</sup> In *Rowan v. Mercer*, 12th May, 1863, 4 Irvine, J. C. 377, the Lord Justice-Clerk (Inglist) and Lord Deas said they thought the point one of

difficulty, and still open.

<sup>(l)</sup> Small-Debt Act, § 15.

<sup>(m)</sup> Small-Debt Act, § 16.

or where the balance remaining due on an ordinary action has been reduced by interim decree or otherwise (before the closing of the record) so as not to exceed that sum, the Sheriff may remit the cause to the Small-Debt Court.(n) The consent of the pursuer is, however, essential to this. Should the pursuer unreasonably refuse his consent, the power contained in the Statute of allowing him no expenses except Small-Debt expenses can afterwards be used ;(o) and this affords a sufficient check on him. The defender has it in his power to appeal against this remit from Sheriff-Substitute to principal Sheriff.(p)

When a case is remitted to the Small-Debt roll, it is conducted from the date of the remit in all respects in the same way as if it had commenced there.(q)

**13. Remitting to Ordinary Court.**—Where the Sheriff considers—either from the point of law involved, or from special circumstances—that the case is unsuited for disposal in the Small-Debt Court, he may remit it to the Ordinary Court. When to do this is matter for his discretion alone. The mere ordering of any written pleading has *ipso facto* the effect of a remit to the Ordinary Court.(r) The cause, when remitted, must be conducted as if it had begun in the Ordinary roll ; and, at whatever stage it may have been in the Small-Debt Court, a record must be made up, and proof (in so far as necessary) taken in the usual way.

**14. Counter Claims.**—Where the defender has a counter

(n) Small-Debt Act, § 4. *Philip v. Forfar Building Co.*, 16th Sept. 1868, 1 Coup. 87.

(o) Small-Debt Act, § 36.

(p) *Ibid.* § 4. See, however, 39 & 40 Vict. c. 70, § 27.

(q) As to expenses, see *supra*, art. 4.

(r) Small-Debt Act, § 14.

claim, he must serve a copy of it on the pursuer at least one free day before the day of appearance. If this is omitted, it cannot be heard without the consent of the pursuer(s). It should be noticed that it is before the day of appearance that the counter claims must be lodged, because it was not intended that summary proceedings should be delayed so that the defender might serve such claims before any adjourned diet. The Statute does not put any limit in regard to the nature of the counter claims that are competent; and, seeing that it contemplates their being disposed of at once, this was not necessary. Where the counter claims require investigation, they may either be reserved in the decree, or, in special circumstances, the case may be adjourned to allow the investigation to be made.

**15. Hearing and Evidence.**—The summons contains authority for citing witnesses for the pursuer and the defender. The summons itself is the warrant to the officer to cite for the pursuer, and the service copy is sufficient evidence of the authority to cite for the defender. As the cases are disposed of summarily, all the witnesses must be present at the first calling. Adjournments are not granted, except upon cause shown, and when they are granted, it is almost always on condition of expenses being paid. If a witness duly cited does not attend, he may be fined summarily £2, and letters of second diligence granted to enforce his attendance. The citations do not require to be given in presence of a witness,<sup>(t)</sup> and may of course be given under the Postal Citations' Act.

The Sheriff hears the parties *viva voce*, and either disposes of the case on the relevancy of their averments, or hears

(s) Small-Debt Act, § 11.

& 35 Vict. c. 42, § 4.

(t) Small-Debt Act, §§ 3 and 12; 34

evidence, as may be proper. When evidence is taken, the witnesses are sworn and examined in the usual way, but no record is kept, even of their names, still less of what they say. On special cause shown, the Sheriff may grant a commission to any competent person to take and report in writing the evidence of any witness unable to attend. He may also make remits to persons of skill to report. Oaths on reference, and all other such things, may be taken as in the Ordinary Court, but without keeping any record.(u)

**16. Judgment and Decree.**—The Sheriff's judgments contain no findings in point of fact or law, but simply the order saying what is to be paid, and what the expenses are. This order is noted in the Book of Causes, and is the warrant to the clerk for issuing the decree.

The expenses are fixed according to the table provided by the Statute, and in addition to them the Sheriff allows (as a necessary incident of the process) the expenses of witnesses, and (in virtue of a special provision) where he sees fit, the personal charges of the successful party.(v)

Where he thinks it proper, the Sheriff may direct the sums due to be paid weekly, monthly, or quarterly, on such conditions as he may think right.(w)

**17. Extract.**—The form of the extract is provided by the Statute, and it is written or printed on the summons.(x) It contains a warrant for instant execution by arrestment, and for execution by poinding and sale, and by imprisonment (if competent) either after ten free days, if the party have been personally present at the pronouncing of judgment, or after a

(u) Small-Debt Act, § 13.

(w) Small-Debt Act, § 18.

(v) Small-Debt Act, §§ 13 and 32.

(x) Sch. (A), No. 7.

charge of ten free days, if the defender was not personally present, that is, was either absent altogether, or was present only by being represented by an agent, or by some one of his family. This issuing of the warrant to sell in the decree itself, and this dispensing with the charge where the debtor has personally heard the judgment, are peculiar to Small-Debt procedure.(y)

Second extracts (it is understood) cannot be given; and if the first extract be lost it is doubtful whether there is any remedy. In some Courts it is held competent to bring a second summons for the amount, and to get a new decree, on abandoning all claim under the first decree, and on proving that it has not been paid, and is lost.

**18. Execution.**—The execution proceeds much in the same way as on an ordinary decree. Care must be taken to give the charge when the terms of the decree require it. If the decree is not enforced within a year from its date, a charge must always be given, whether the decree specially require it or not; and where a charge is at first required, if the decree be not enforced within a year from the date of a charge upon it, a new charge must be given.(z)

**19. At whose Instance.**—There is no provision in the Small-Debt Act for assigning decrees, such as is contained in the Personal Diligence Act for ordinary decrees; but they can be assigned at common law; and as the charges and executions and schedules of poinding and imprisonment do not require it to be stated at whose instance they proceed, no

(y) Small-Debt Act, § 13. *Shiell v. Moesman*, 7th Nov. 1871, 10 M. 58.

(z) Small-Debt Act, § 13.

difference need be made upon their terms, in the event of diligence being done by the assignee.(a)

**20. Execution beyond County, or Scotland.**—When a decree is to be enforced against the person or effects of a party within another county, it must first be endorsed by the Sheriff-Clerk of that county.(b) The decree may be enforced in England or Ireland under the provisions of the Inferior Courts Judgments Extension Act, 1882.(c)

**21. Poin ding and Sale.**—After the expiry of the proper time, or of the days of charge where a charge has been requisite, the poin ding is carried out in a summary way. The officer gets the effects duly appraised by two witnesses, who act on oath.(d) He then leaves a list with the party whose effects they are. The decree is not itself a warrant for opening doors or lockfast places, but if the poin ding cannot be carried out without that, the officer must report the fact, and on doing so and making application, he will get the requisite authority.(e)

The sale is carried out not sooner than forty-eight hours after the poin ding. The effects are taken to the nearest town or village, or, if they are poin ded in a town or village, to the cross or most public place in it, and there are sold by the officer by public roup. Two hours' previous notice must be given by the crier, and the sale must take place between eleven forenoon and three afternoon. The Sheriff may (by general regulation or special direction) alter the hour or place

(a) Compare *Crombie v. M'Ewan*, 17th Jan. 1861, 23 D. 333.

(b) Small-Debt Act, § 19.

(c) 45 & 46 Vict. c. 31; *supra*, p. 360.

(d) Act, Sch.(G); *Le Conte v. Richardson*, 1st Dec. 1880, 8 R. 175.

(e) *Scott v. Letham*, 23rd May, 1846, 5 Bell's Ap. Ca. 126.

for the sale, or appoint a longer or different kind of notice to be given. Any surplus, after paying the amount in the decree, and the statutory expenses of the poinding and sale, are to be returned to the owner or consigned with the Sheriff-Clerk if he cannot be found. Where the goods are not sold, they are delivered to the creditor at the appraised value to the extent of the debt and expenses of poinding and sale.

When the poinding is followed by a sale, or by delivery, the officer must report it to the Sheriff-Clerk within eight days after the day fixed for the sale. Where no sale or delivery takes place, it is not the practice to report the poinding, and the Statute does not seem to require it.(f)

**22. Breach of Poinding.**—There is a provision in the Small-Debt Act that any person secreting, or carrying off, or intromitting with any poinded effects *in fraudem* of the poinding creditors, is to be liable to summary fine or imprisonment, as for contempt of Court, at the instance of the private party, or of the Fiscal, or of the Sheriff *ex proprio motu*—besides being liable in civil consequences.(g) Resort to this provision is not to be recommended. Where an act of contempt is committed in the face of the Court, the form for punishing it is simple and easily followed; but there being an absence of any kind of authority for guidance as to what proceedings should be taken for punishing an act of contempt committed outwith the presence of the Court, it may easily be found that no amount of care and experience will be sufficient to secure their regularity, and that in place of their attaining their object, their result may only be to inflict further hardships upon the person who has been defrauded.

(f) Small-Debt Act, § 20, and relative schedules.

(g) Small-Debt Act, § 20.

**23. Arrestment in Execution.**—Arrestment in execution proceeds on a Small-Debt decree without a charge in the same way as on an ordinary decree, and the forms provided in the Act for arrestment on the dependence may be used with the necessary verbal alterations. The things that may be arrested are the same as on an ordinary decree ;(h) and, as on an ordinary decree, arrestment may proceed instantly.(i) An arrestment in execution expires within three months, in the same way as an arrestment on the dependence.(j)

**24. Furthcoming.**—Where the amount asked from the arrestee does not exceed £12, a furthcoming may be brought in the Small-Debt Court. It is immaterial from what Court the warrant on which the arrestment proceeded was issued, provided the sum arrested does not exceed, or has been restricted, to £12. Bringing the furthcoming in the Small-Debt Court will have no effect in restricting the pursuer's claim against the common debtor.(k)

The form of summons is provided in the Statute.(l) The action is brought in the county in which the arrestee resides, and it cites him to appear at a Court not sooner than the sixth day after citation. The common debtor, when in the same county, is cited on the same *induciæ* ; but if he reside out of that county, he cannot be cited to appear sooner than the twelfth day after citation. It must always be so arranged that the arrestee and the debtor are cited to the same Court.(k)

The action of furthcoming is disposed of on the same principles as an action of furthcoming in the Ordinary Court ; and,

(h) See *supra*, p. 352.

(i) Small-Debt Act, Sch. (A), 7.

(j) Small-Debt Act, § 6. From the position of the provision in the Statute, there is room for believing that it was

meant to apply to arrestments on the dependence only.

(k) Small-Debt Act, § 9.

(l) Schedule (D).



in regard to practice, in the same way as a petitory action in the Small-Debt Court.

When arrested effects have to be sold, a warrant to sell them, or as much of them as will satisfy the debt and expenses of process and the expense of sale, is inserted in the decree of furthcoming : and the sale is conducted like a sale of poinded effects under the Small-Debt Act.(m)

**25. Multiplepoinding.**—Where any person holds a fund or subject not exceeding the value of £12, claimed by more than one party under arrestment or otherwise, he may raise a multiplepoinding in the Small-Debt Court.(n) In practice, this power is used only in regard to funds of money. The Statute provides the form of the summons.(o) The action must be brought within the jurisdiction of the holder of the fund, and may be raised either by the holder himself or by one of the claimants in his name. The other parties must be cited in the way provided for in actions of furthcoming. At the calling of the cause the Sheriff may order claims to be given in, and (if necessary) may appoint such public intimation of the action as he thinks proper ; but on the first day he cannot pronounce any judgment preferring any party to the fund. Under his powers at common law he may, however, order consignment. The claims, when given in, must be in the form provided for by the Statute ; and it is advisable that the names of the claimants, with the amounts of their claims, should appear in the Book of Causes. The other proceedings are the same as in petitory Small-Debt actions.

**26. Sequestrations.**—In the Small-Debt Court a landlord

(m) Small-Debt Act, § 20.

(o) Schedule (E).

(n) Small-Debt Act, § 10.

may sequester for rent, or a balance of rent, not exceeding £12; and that either in security or in payment.(p) The summons is in the form prescribed by the Statute,(q) and the conclusions are for warrant to inventory and (if need be) secure the effects upon the premises, and for decree for the rent or balance of rent. The summons also contains a warrant to inventory and secure the effects until the further orders of the Court. Where the effects have been improperly removed, a minute may be put on the summons craving warrant to carry them back, and such a warrant may then be granted accordingly.(r)

The officer, in executing a sequestration summons, inventories the effects and has them appraised by two witnesses, and an inventory is given to the tenant along with his citation. An execution of the citation and sequestration, with the appraisement, must be returned to the clerk within three days.

On the calling of the cause, the Sheriff hears the parties. If the sequestration be in security, he usually continues the case till after the term of payment to see if the rent be paid. Sometimes, however, decree is pronounced, with a proviso that it is not to be enforced until the term has passed with the rent unpaid. If the sequestration be in payment, he will dispose of it at once, either recalling it if it be improper, or decerning for the rent and granting warrant to sell the sequestrated effects if there be no good defence. The sale is carried out in exactly the same way as a sale of poinded effects.(s)

(p) Small-Debt Act, § 5; 16 & 17 Vict. c. 80, § 28.

(q) Schedule (B).

(r) Sellar's Forms, vol. i. p. 355.

(s) Small-Debt Act, § 20. Any one

interfering with sequestrated effects, in fraudem of the hypothec, is liable to the same punishment as for breach of poinding (art. 22).

The sequestration may be recalled by the Clerk of Court where the tenant either pays the rent and expenses, or consigns the rent, with £2 to cover expenses. In the case of payment, the Clerk writes on the summons the words "payment made," and that operates as a recall. In the case of consignment, the Clerk in like manner indorses the words "consignation made;" intimation is made to the landlord by an officer of Court; and then the recall is complete.<sup>(t)</sup>

Sequestrations in the Small-Debt Court must be registered like other sequestrations.<sup>(u)</sup>

(t) Small-Debt Act, § 5.

p. 496, art. 9.

(u) 30 & 31 Vict. c. 42, *supra*,

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## CHAPTER II.

## DEBTS-RECOVERY COURT.

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|---|-------------------------------------|
| 1. <i>What Debts may be Sued for.</i>                 | 7. <i>Judgment by Default.</i>      |
| 2. <i>Records of Court and Circuits.</i>              | 8. <i>Expenses.</i>                 |
| 3. <i>Agents.</i>                                     | 9. <i>Appeals in Sheriff Court.</i> |
| 4. <i>Proceedings competent on Calling the Cause.</i> | 10. <i>Extract and Execution.</i>   |
| 5. <i>Proceedings at the Proof.</i>                   | 11. <i>Furthcoming.</i>             |
| 6. <i>Judgment on the Merits.</i>                     | 12. <i>Multiplepoundings.</i>       |
|   | 13. <i>Sequestrations.</i>          |

The Debts-Recovery Court is an extension of the Small-Debt jurisdiction to £50, accompanied by restrictions as to the kind of debt that may be sued for, and additional requirements in regard to the forms of process. In order to save repetition, there will be noticed here only the points in which the procedure differs from the Small-Debt procedure.

**1. What Debts may be Sued for.**—The debts that may be sued for under the Debts-Recovery Act may be generally described as those which fall under the triennial limitation or prescription, or which would have fallen under that prescription but for their being constituted by a written obligation. The somewhat quaint words of the Triennial Prescription Act<sup>(a)</sup> have been copied in the Debts-Recovery Act, and the jurisdiction therefore extends to actions of debt for “house maills, men’s ordinaries, servants’ fees, merchants’ accounts, and

(a) 1579, c. 83; Dickson on Evidence, §§ 476 to 487, contains a com-

plete account of the scope of the Triennial Act.

other the like debts ;” and the qualifying words of the Prescription Act, “that are not founded upon written obligations,” are omitted.(b) Under “house maills” are included the rents of houses. Under “men’s ordinaries” come furnishings of all kinds of eatables for consumption. The expression “servants’ fees” is very widely interpreted, and includes, in addition to the wages of ordinary servants, the remuneration of all kinds of professional men and workmen. To “merchants’ accounts” it has sometimes been attempted to give rather a restricted meaning, but without very much reason. It is settled that the expression includes wholesale as well as retail dealings ;(c) but it has been questioned whether it applies to single as well as to repeated transactions. As every one, however, who buys or sells is for the time being a merchant, there is no reason for limiting the application of the statute to dealings with those who are merchants by profession ;(d) and if this be conceded, it is equally clear that there is no reason for saying that an account must contain at least two entries. The words “other the like debts” serve to enable the Court to give a wide interpretation to all the enumerated classes, and as the Debts Recovery Act is an enabling Act, while the Triennial Prescription Act is a restricting one, the same words used in the former may have a wider meaning than when used in the latter. Thus an action for money disbursed under a mandate is competent in the Debts-Recovery Court, as coming under the category of a merchant’s account.(e)

The jurisdiction thus conferred is tolerably extensive, but

(b) 30 & 31 Vict. c. 96, § 2.

(c) *Sandys v. Lowden*, 26th Nov. 1874, 2 R. (J. C.) 7.

(d) The attempt to narrow the meaning of “merchant” to the petty village trader who goes by that name in Scot-

land, if carried out, would prevent the application of the Statute to wholesale accounts, which would be going against the case quoted in the preceding note.

(e) *Grant v. Fleming*, 10th Dec. 1881, 9 R. 257.

still leaves some remarkable omissions. Thus, actions of damages are incompetent. Actions of aliment are also incompetent, although there is probably no class of action to which a summary and cheap remedy would have been more appropriate. Equally incompetent are actions on bills of exchange, guarantees, and other mercantile obligations. Rents for agricultural subjects seem also excluded.

In the Debts-Recovery Court the debt sued for, exclusive of expenses and dues of extract, must exceed the value of £12, and be under the value of £50. Counter claims must be of the same nature, and between the same values, as the claims.

**2. Record of Courts and Circuits.**—The records are kept much in the same way as in the Small-Debt Court. The interlocutors are minuted in a Book of Causes, excepting when they set forth at length findings in law and in fact, in which case they are written on a separate paper, and their date inserted in the book. The Minute-Book was apparently intended to be kept (like the Small-Debt Book) so as to be a register of each day's proceeding in Court. In some Courts, however, the book is kept, not as a day-book, but as a ledger, a large space being given to each case, and a note of each proceeding being added as it occurs, and signed by the Sheriff.

The circuits which the Sheriff holds through his Sherifffdom, for the purposes of the Small-Debt Act, are also available (under the same conditions) for Courts held under the Debts-Recovery Act.

**3. Agents.**—The parties may appear and plead personally, or by any person *bona fide* employed by them in their

usual business, or by a procurator of Court.(f) The fifteenth section of the Small-Debt Act not having been adopted, it is not competent to permit a party to appear by a member of his family, or by any representative other than a procurator.(g)

**4. Proceedings Competent on Calling the Cause.**—The summons is the same as the Small-Debt summons, except that it contains no warrant to cite witnesses.(h) Counter claims must be pleaded at the calling of the cause, but it does not appear necessary to serve them on the pursuer.(i) On the cause being called, if both parties appear, the Sheriff hears them on the grounds of action and nature of the defence. If either party fail to appear, the Sheriff may decide in absence against him. The rules as to reponing are the same as in the Small-Debt Court, except that the time for a pursuer getting himself reponed has been extended from one month to three.(j)

After hearing parties the Sheriff makes a short note of their pleas. The statute, however, does not give to this note the full effect of a record. Its use will be to guide the Sheriff, at the trial of the cause, about adjourning the proof, and giving a party time to bring additional evidence, on the ground that he has been taken by surprise by the evidence adduced by his opponent. The general form of note is to

(f) Debts Recovery Act, § 4.

(g) *Ibid.* § 5.

(h) *Ibid.* § 3.

(i) Section 11 of the Small-Debt Act is not adopted; and there is no necessity for the pursuer having earlier notice of the counter claim than at the calling, because the proof does not go

on till on another day. If a counter claim is stated of a kind that is incompetent in the Debts-Recovery Court, the case may be remitted to the Court Ordinary.

(j) Debts-Recovery Act, § 7. As to reponing against decrees by default, see art. 7.

minute first what the defender says in answer to the summons, and then what the pursuer replies. There is nothing to prevent the parties bringing a prepared note of their pleas for the Sheriff to revise and adopt. (k)

If the case appears unsuited for summary trial, it may be remitted to the ordinary court, in which case it will proceed like an ordinary action. After this, no objection that the debt is not of the kind that can be sued for in the Debts-Recovery Court, can prevail. (l) There is no power either of remitting causes from the Debts-Recovery Court to the Small-Debts Court, or of remitting causes from the Ordinary Court to the Debts-Recovery Court, though on the written consent of parties, both these things are sometimes done.

The Debts-Recovery Act does not make any express provision for causes being disposed of on the relevancy, but if a plainly incompetent or irrelevant cause were brought, the Sheriff could exercise his common-law power of dismissing the summons, or assoilzieing from the action as laid. And although it may be held, in like manner, to be implied, there is no express provision or power which would enable the Sheriff to give judgment simply on admissions made by a defender. After noting the pleas the Sheriff is directed to fix a time and place for proceeding to try and determine the cause, and to grant warrant for citing witnesses and havers for both parties.

**5. Proceedings at the Proof.**—At the trial, the evidence is not recorded, unless either of the parties request it to be so. When this request is made, the evidence may be recorded by the Sheriff, or dictated by him to a clerk, or to a shorthand writer. The note of evidence sets forth the

(k) Debts-Recovery Act, § 8.

(l) Debts-Recovery Act, § 8.



same particulars as if it were taken in an ordinary action.(*m*) When the evidence is not recorded, there is no appeal from the decision of the presiding Sheriff on matters of fact;(n) and there is no mode of escaping this provision by appointing the evidence to be reheard.(o)

**6. Judgment on the Merits.**—The judgment of the Sheriff must contain findings in point of fact and findings in point of law, as well as the proper decernitures.(*p*) The Act omits to say that findings in fact are to be pronounced in the case of the evidence not having been recorded. This is obviously an oversight, because where there is no record of evidence, and where the findings of the Sheriff on fact are therefore to be final, it is more important to have them than in any other case.

**7. Judgment by Default.**—There is considerable diversity of opinion as to whether it is competent to pronounce a decree by default(*q*) in the Debts-Recovery Court. The better opinion is that it is competent to do so, but by some it is maintained that although the pleas may be minuted, the proof recorded, and the case debated, the decree is still only one in absence if the defender absent himself when judgment is pronounced. This does not seem at all reasonable, but it is alleged to be justified on the ground that a decree pronounced in as nearly as may be the same circumstances in the Small-Debt Court would be a decree in absence;(r) and that the

(*m*) Debts-Recovery Act, § 9.

(*n*) *Ibid.* § 10. As to distinguishing in the findings between fact and law, which may here be of consequence, see *ante*, p. 189.

(*o*) *Cumming v. Spencer*, 21st Nov.

1868, 7 Macph. 156.

(*p*) Debts-Recovery Act, § 9.

(*q*) As to decrees by default, and the mode of being reponed against them, see *ante* p. 285.

(*r*) *Supra*, i. 10, p. 513.

Debts-Recovery Act provides that the force and effect of its decrees in absence are to be the same.(s) The foundations of this argument seem correct, but it does not apply, because in the Debts-Recovery Court there is a record, and nothing to derogate from the common-law doctrine that a decree pronounced after defences are minuted, is a decree *in foro*. It is a curious argument to say that decrees by default are incompetent in the Debts-Recovery Court, because the effect of decrees in absence is in it the same as in the Small-Debt Court.(t)

**8. Expenses.**—The expenses payable to procurators are fixed in the Act,(u) and they cannot be increased, unless the additional charges can be justified as coming under the head of necessary outlay, as where an agent has to be employed to attend to a proof taken at a distance on commission.(v) The Sheriff's common-law power of modifying expenses, or altogether refusing them, remains.(w)

**9. Appeals in Sheriff Court.**—No appeal during the preparation of a cause is competent,(x) but when the Sheriff-Substitute has pronounced the final judgment the party thinking himself aggrieved may appeal to the principal Sheriff within eight days.(y) The appeal is engrossed as in an ordinary action. In support of this appeal, no argument,

(s) Debts-Recovery Act, § 6.

(t) Debts-Recovery Act, § 6; Journal of Jurisprudence, vol. 14, p. 280, and vol. 17, p. 162. In Glasgow, the practice recommended in the text is followed. Sellar's Forms, vol. i. p. 353.

(u) Debts-Recovery Act, § 13.

(v) Stewart v. Bain, 27th Sept. 1872, 2 Coup. 344.

(w) Fraser v. Mackintosh, 19th Dec.

1867, 6 M. 170.

(x) Debts-Recovery Act, § 10. Thus an interlocutor limiting the proof to writ or oath cannot be appealed; Mitchell v. Moultry, 16th Dec. 1882, 20 S. L. R. 263.

(y) Ibid. § 11. Sixteen days are allowed in the case of Orkney and Shetland. The appeal submits all the interlocutors to review.

written or oral, is permitted, but a note of authorities may be added to it. Leave to add new pleas has been refused.(z) The Sheriff has power to order the case to be reheard, and the evidence to be taken of new, or additional evidence to be taken. Where the evidence is not recorded there is, as already explained (art. 5), no appeal in fact.

**10. Extract and Execution.**—The rules as to extract and as to execution in Scotland, as well as in the other parts of the United Kingdom, are the same as in the Small-Debt Court,(a) with two trifling exceptions,—viz., that all poindings must be reported, whether they be followed by a sale or not,(b) and that arrestments suffer the usual prescription.(c)

**11. Furthcoming.**—The action of furthcoming is precisely the same as in the Small-Debt Court; but whether it is the debt in the decree under which the furthcoming is brought, or the debt intended to be attached, or both, which are to be of the nature competent under this Act, does not very clearly appear. As, however, the limit of amount applies under the Small-Debt Act to the debt to be attached, the limit of amount will apply to the same debt under this Act, and therefore the limit as to the nature of debt should apply to it also.(d)

**12. Multiplepoindings.**—In multiplepoindings the fund *in medio* must exceed the value of £12, and not exceed the value of £50, and all the claims must be of such nature or value as could competently be claimed in a summons under

(z) *Simpson v. Selkirk*, 2nd Feb. 1881, 8 R. 469.

(a) *Debts-Recovery Act*, §§ 9 and 11, concluding clauses.

(b) *Debts-Recovery Act*, § 16.

(c) *Ibid.* § 5, concluding *proviso*.

(d) *Ibid.* § 5; *Small-Debt Act*, § 9,

the Debts-Recovery Act. If any of the claims are not of this kind, the Sheriff can exercise his power of remitting the cause to the ordinary roll.

**13. Sequestrations.**—Sequestrations in payment are competent where the rent of the house,<sup>(e)</sup> or the balance of the rent, is over £12 and under £50.<sup>(f)</sup> The proceedings are the same as in a Small-Debt sequestration.

It is doubtful whether sequestrations in security are competent in the Debts-Recovery Court. As they were thought incompetent under the original Small-Debt Act, a provision was inserted in the Act of 1853 declaring that the Small-Debt Act should extend to sequestrations in security.<sup>(g)</sup> This provision of the Act of 1853 was, however, not expressly adopted in the Debts-Recovery Act, and therefore the matter is not clear. But as the provision of the Small-Debt Act which has been adopted is one which has been “declared” by the Legislature to extend to sequestrations in security, their competency would seem to be thereby established.<sup>(h)</sup>

Sequestrations under the Debts-Recovery Act must be registered like other sequestrations.<sup>(i)</sup>

<sup>(e)</sup> *Supra*, art. 1.

<sup>(f)</sup> Debts-Recovery Act, § 5; *supra*, art. 1.

<sup>(g)</sup> 16 & 17 Vict. c. 80, § 28.

<sup>(h)</sup> See a judgment by the late Mr. Sheriff Cook, reported in the *Journal of Jurisprudence*, vol. 12, p. 152 and p. 186. In Lanarkshire they are thought incompetent; the same view was taken in

Aberdeenshire, and much the same opinion is given in Mr. Badenach Nicolson's Digest of the Act, p. 60. In the meantime the practitioner will therefore act prudently by not raising sequestrations in security in the Debts-Recovery Court.

<sup>(i)</sup> *Supra*, p. 496, art. 9.

## PART V.

### SUCCESSION.

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**Introductory.**—The jurisdiction which the Sheriff exercises in matters of succession belongs to him partly in virtue of his original office, and partly because he is the inheritor of a large part of the jurisdiction of the Commissaries. In the former capacity he deals with heritable property, in the latter with moveable. By a recent Statute he has a certain very limited power of dealing with the succession to parties who have disappeared for long periods and are therefore presumed to be dead. The treatment of his powers under this Statute will form a sequel to the treatment of his powers in the ordinary matters of succession.

#### CHAPTER I.

#### HERITABLE SUCCESSION.

- |  |                                       |
|--|---------------------------------------|
| 1. <i>Jurisdiction in Services.</i>    | 6. <i>Opposing Petition.</i>          |
| 2. <i>Form of Service Petition.</i>    | 7. <i>Appeal to Court of Session.</i> |
| 3. <i>Publication of the Petition.</i> | 8. <i>Recording and Extract.</i>      |
| 4. <i>Proceedings in Services.</i>     | 9. <i>Reduction of Service.</i>       |
| 5. <i>Competing Petitions.</i>         |                                       |

**1. Jurisdiction in Services.**—Since 1847 the service of heirs has proceeded on petition to the Sheriff, instead of before a

jury. The regulations have been re-enacted in the Titles to Land Consolidation Act of 1868.(a) In a petition for a general service, the heir applies to the Sheriff within whose jurisdiction the ancestor had at the time of his death his ordinary or principal domicile ; and in the case of a special service the heir applies to the Sheriff within whose jurisdiction the lands, or the burgh containing the lands, are situated. In both cases the Sheriff of Chancery has a co-ordinate jurisdiction ; and he has the sole jurisdiction in general services when the ancestor had no domicile in Scotland at the time of his death, or when his domicile was unknown or doubtful ; and in the case of all applications relating to land situated in more counties than one.(b)

**2. Form of Service Petition.**—The form of the petition is prescribed by the Statute of 1868 for all cases, except one which is provided for by the Conveyancing Act of 1874, but notwithstanding the opinion which Lord Watson (when Lord Advocate) gave, that the statutory forms were not superseded by the Act of 1876, I am unable to see how if the First Division were right in applying the ordinary form of petition to such extraordinary remedies as a process of *cessio bonorum*, and an application for a *meditatione fugæ* warrant, it can be restricted from being applicable also to services.(c) In whichever of the forms the petition be drawn, its essentials are the same, and it cannot but be regretted that there is room for uncertainty, and it may be for litigation on a point of such trivial importance.

In the case of a general service, the petition sets forth when and where the ancestor died, and where he was domiciled

(a) 31 & 32 Vict. c. 101.

Chancery (§ 53) is now superfluous.

(b) 31 & 32 Vict. c. 101, §§ 28 and 38.

The provision that Sheriff Court agents may practise before the Sheriff of

(c) Opinion by Lord Advocate Watson, on memorial by Director of Chancery, 31st Oct. 1878.

at the time of his death. Then it states the relationship of the petitioner, and the character in which he desires to be served. If it be under a deed of provision, the deed must be specified by its date and the name of the granter, or be otherwise described so as clearly to identify it. If it be a deed of entail, the petitioner may refer to it as already recorded in the Register of Tailzies, and quote only the destination or such part thereof as may be deemed necessary.

In petitions for special service the domicile of the ancestor need not be set forth, but the lands in question must be, and that either by their full description, or by some leading name, coupled with a reference to some prior deed recorded in the Register of Sasines, where the full description will be found. The title of the ancestor must be set forth ; and when it is an entail, the conditions must either be entered at full length, or referred to. The relationship or character the petitioner bears is then set forth in the same way as in a petition for general service.

If a general service is desired, in the same character as that in which the special service is asked, it may be craved in the same petition as that for special service.

Where a general service is to be limited by a specification, that must be specially mentioned, and the specification duly given.

Where proprietors, one or more, having only a personal title, have intervened between the petitioner and the person last infest, the application is made in the form of petition for a special service. A form for this is provided in the Conveyancing and Land Transfer Act of 1874.(d)

The petition is signed by the petitioner, or by his mandatory specially authorised.(e)

(d) 37 & 38 Vict. c. 94, § 10, printed in Appendix, Part II. Chap. VII.

(e) Act 31 & 32 Vict. c. 101, § 29.

**3. Publication of the Petition.**—The petition is published at the Court-house, and at the office for Edictal Citations in Edinburgh. The publication at the Court-house is given by affixing a short abstract of the petition on the doors, or on some conspicuous place in the Court, or in the office of the Sheriff-Clerk, as the Sheriff may direct. The edictal publication is secured by leaving a short abstract of the petition at the office of Edictal Citations at the General Register Office, Edinburgh.(f)

Caveats may be lodged with the Sheriff-Clerk by any person desirous of getting special notice; and then the Clerk must post a notice of the presentation of a petition, or of any official intimation of one received by him, to the address given, within twenty-four hours.(g)

**4. Proceedings in Services.**—No evidence can be taken, or decree pronounced, in the petition till after the elapse of fifteen(h) days from the date of the latest publication. After that, evidence may be led before the Sheriff himself, or before a provost or bailie of any city, or royal or parliamentary burgh, or before any justice of peace, or before any notary-public, or before any commissioner whom the Sheriff may name.(i) The evidence is taken down as in a proof on commission, and an inventory of all documents produced is certified by the official before whom the evidence was led. On considering the evidence, the Sheriff pronounces decree serving the petitioner, or dismissing the petition, in whole or in part, as may be just.

(f) 31 & 32 Vict. c. 101, § 30.

(g) *Ibid.* § 31.

(h) *Ibid.* § 33. Twenty days in the case of Orkney and Shetland being concerned.

(i) *Ibid.* § 33. A Justice of Peace

may act at home or abroad. It seems clear that at common law the person taking the proof must have no interest in the proceedings, either personally or as agent.



**5. Competing Petitions.**—Where any person conceives himself to have a preferable right to be served, he may present a competing petition to the Sheriff; and at any time before pronouncing decree in the first petition, the Sheriff may sist it or conjoin it with the second. He may then allow each of the parties not only a proof in chief, but a conjunct probation in reference to the claim of the other.(j)

**6. Opposing Petition.**—No person can oppose a petition unless he has a competing claim to be served. It does not seem essential that an opponent should lodge a notice of appearance, but he must present his objections in writing. The Sheriff is then directed to dispose of them in a summary manner after hearing (if he finds it necessary) parties orally thereon. This direction allows of no other record except the petition and the objections.(k)

**7. Appeal to Court of Session.**—Where the Sheriff pronounces a decree refusing to serve, or dismissing a petition, or repelling the objection of an opponent, the decree may be brought under review by a note of appeal. This must be presented within fifteen days from the judgment.(l) It must be intimated to an opponent or a competitor. The Court of Session deals with such appeals, as far as may be, as with appeals in ordinary actions, allowing additional evidence to be taken, or sending the case to a jury, as they may find right.(m) Either party may appeal also for jury trial, in the same way as in an ordinary action; and in the Supreme Court the case will

(j) Act, § 35.

(k) Act, § 40. This clause plainly applies to cases where the death of the ancestor is admitted, and the only question is as to the service. Where the death is not admitted, there is nothing

to prevent any party interested from appearing.

(l) Act, § 42. Twenty days are allowed in the case of Orkney and Shetland.

(m) §§ 42, 44, and 45.

always be tried by jury, unless special cause be shown to the contrary.(n) If the Court of Session determine to serve, they remit to the Sheriff to carry out their judgment.(o)

**8. Recording and Extract.**—The petition, decree, proof, and inventories of documents are transmitted by the Sheriff-Clerk on the application of the petitioner, to the office of the Director of Chancery, in Edinburgh, and the extracts are prepared in Chancery, and thereafter returned to the Sheriff-Clerk to be given to the party or his agent. Separate extracts may be had, if prayed for in a petition which relates to separate parcels of land.(p)

A copy of the printed index of all the services in Scotland is directed by the Conveyancing Act of 1874 to be kept for public inspection in every Sheriff-Clerk's office.(q)

**9. Reduction of Service.**—After a service has been carried through, a reduction of it may be brought at any time within twenty years(r) by any party having a competing title.(s) In such a reduction, the *onus* of proof lies with the pursuer, but he does enough if he shows that the evidence on which the service proceeded was insufficient; and should he do that, the defender may lead further evidence.(t) The case may be tried by jury, or in any way in which civil causes may competently be tried; and the result will depend on the true merits, as an error in the mere character in which the heir was served will not affect the decree of service, if it appear that he was in truth entitled to succeed to the lands.(u)

(n) *Ibid.* § 41; *Mackintosh v. Ross*,  
7th Dec. 1875, 3 R. 232.

(o) Act, as quoted in two preceding  
notes.

(p) *Ibid.* § 36.

(q) 37 & 38 Vict. c. 94, § 58.

(r) 1617, c. 13.

(s) 31 & 32 Vict. c. 101, § 43.

(t) *Alexander v. Officers of State*,  
30th March, 1868, 6 M. (H. L.) 54.

(u) 37 & 38 Vict. c. 94, § 11.

## CHAPTER II.

## MOVEABLE SUCCESSION.

1. *Jurisdiction.*
2. *General Regulations.*

## APPOINTMENT OF EXECUTORS.

3. *Petition.*
4. *Intimation.*
5. *Calling of the Petition.*
6. *Decree and Extract.*
7. *Competition for Office of Executor.*
8. *Interim Custody of Estate.*
9. *Appointment of Factors.*
10. *Executor Dying before Confirmation.*

## CONFIRMATION OF EXECUTORS.

11. *How Executors confirmed.*

12. *When and to what amount Caution must be found.*
13. *Bills to Inventories.*
14. *Confirmation ad non executa, omissa vel male appreciata.*
15. *Of Confirming to English or Irish Property.*
16. *Certifying English or Irish Probates or Letters of administration.*

## SMALL SUCCESSIONS.

17. *Succession Acts of 1875 and 1876.*

**Introductory.**—A personal union of the office of Sheriff and Commissary was first effected in 1823.(a) This state of matters lasted for a little more than half a century, till 1876, when the Commissary Courts were abolished, and their powers and jurisdictions transferred to the Sheriff Courts.(b) At the same time the office of Commissary-Clerk was abolished in most of the counties, and provision was made for its abolition in all except Edinburgh. It was abolished in every case in which the office was remunerated by salary and was held by a Sheriff-Clerk. In the other cases, it was provided that,

(a) 4 Geo. IV. c. 97 ; and see also  
11 Geo. IV., & 1 Will. IV. c. 69, § 30.

(b) 39 & 40 Vict. c. 70, Part VII.

except in Edinburgh, no new appointment should be made, but that the present occupants of the office should continue to hold it, performing its duties in the Sheriff Court. In Edinburgh the office of Commissary-Clerk is intended to be kept up in perpetuity, in consequence of the convenience of having some central authority in matters of moveable succession, for the preparation of the Calendar of Confirmations. A suggestion that the same official should also be appointed Principal Clerk to the Sheriff of Chancery, and should thus have under his cognisance all successions, whether heritable or moveable, has not in the meantime received effect. Hereafter it will in Scotland be in general unnecessary to distinguish between the powers the Sheriff has as successor to the Commissaries and his other powers, and in any case where the forms of Court otherwise permit, he may exercise in one application all his powers, irrespective of their origin. In Edinburgh, however, in perpetuity, and, for the present, in those counties where a separate Clerk for conducting the old Commissary business still exists, this thorough incorporation will not take place, and it will still be necessary to keep the jurisdictions separate to the extent of having the proceedings in each left to the care of the proper Clerk. It is therefore still necessary to explain what powers the Sheriff has as successor to the Commissaries, and this will best be done by briefly explaining the jurisdiction of the old Commissary Courts.

**1. Jurisdiction.**—In practice the jurisdiction of the old Commissary Court was limited to matters concerning moveable succession; and even there the duties were ministerial. It appointed executors where a person died without naming them; and confirmed the title of all executors to act. If there were competitors for the office of executors, it decided who had the

better right; and either in such cases, or when otherwise necessary, it made arrangements for the interim custody of the estate. But (where a will was proved) it could not decide on its validity, or on questions as to the distribution of the estate. The confirmation of executors under a will does not conclusively affirm its validity. It makes debtors of the deceased who pay to the executors safe in doing so; but the validity of the will is still open to challenge in any competent Court, and the Commissary could not settle such a point, although most questions as to the validity of a will, or the distribution of the estate, can be tried in a multiplepoinding or other action in the Sheriff's Ordinary Court.

In regard to matters other than succession, the Commissary Courts, which inherited the jurisdiction of the Old Diocesan Ecclesiastical Courts, once had extensive powers; but these dwindled away, till latterly the Courts exercised a jurisdiction only in consistorial actions, in Small-Debt cases, and in actions for slander, where their jurisdiction had been preserved by their having the peculiar power of making the defender pronounce a "palinode," or recantation, under pain of imprisonment. The consistorial jurisdiction was transferred to the Court of Session.(c) The Small-Debt jurisdiction was abolished;(d) and the action of palinode has fallen into such disuse that it is not worth while to repeat the rules concerning it.

**2. General Regulations.**—The appointment and confirmation of executors is mainly regulated by an Act passed in 1858;(e) and by an Act of Sederunt following on it, passed

(c) 11 Geo. IV. & 1 Will. IV. c. 69,  
§ 22; 13 & 14 Vict. c. 36, § 16. See  
also 6 & 7 Will. IV. c. 41.

(d) 4 Geo. IV. c. 97, § 7.

(e) 21 & 22 Vict. c. 56.

in 1859.<sup>(f)</sup> On these Acts some modifications were made by Part VIII. of the Sheriff-Court Act of 1876. Some minor points as to confirmations are also regulated by an Act passed in 1823.<sup>(g)</sup> Where causes are litigated, the regulations laid down in the Act of Sederunt of 1839, as modified by the Act of 1853 (and that of 1876) are applicable,<sup>(h)</sup> and the effect of this is that they must be conducted in all respects, as nearly as possible, in the same form of process as ordinary actions. The fees of the clerks are regulated by the Act of Sederunt of 1859, and they are entitled to charge "no other or higher fees" than those there stated. The fees for agents in executry business are fixed by the Act of Sederunt of 1878.<sup>(i)</sup>

Under Acts passed in 1875 and 1876 certain facilities are given for proceedings in successions not exceeding £300 of assets. These will be noticed after noticing the ordinary provisions.

The useful "Calendar of Confirmations and Inventories" is arranged and published by the Commissary-Clerk of Edinburgh, under the Sheriff-Court Act of 1876, from the materials supplied to him by the Sheriff-Clerks, and those under his own control. It is published annually, and contains in alphabetical order a great deal of information as to the personal estates which have been dealt with during the year. Copies lie for public inspection in every Sheriff-Clerk's office.<sup>(j)</sup>

#### APPOINTMENT OF EXECUTORS.

### 3. Petition.—Where the deceased has not named executors,

(f) A. S. 19th March, 1859.

(g) 4 Geo. IV. c. 98.

(h) A. S. 1839, § 161. *Anderson v.*

Gill, 25th June, 1850, 20 D. 1326 ; 16th

April, 1858, 3 Macq. 180.

(i) A. S. 4th Dec. 1878, Sch. II.

(j) 39 & 40 Vict. c. 70, § 45.

or where those named by him have declined to act, the Sheriff appoints them. The mode of application used always to be by petition in the form prescribed by the Act of 1858,<sup>(k)</sup> but of late years the practice has varied, and in many Courts the form prescribed by the Act of 1876 is used. Looking to the way in which the Court of Session has interpreted that Act,<sup>(l)</sup> it is difficult to say that those who adopt the new form are not right, although it is a clumsy form for the purpose, and although the same reasons which have led high authorities to think the old form the proper one in services, are here applicable.<sup>(m)</sup> The weight of the authorities seems in favour of the new form. In substance the petition sets forth the name and designation of the deceased, the time and place of his death, and where his ordinary or principal domicile then was. It also sets forth the character in which the applicant asks for the appointment of executor, whether as next-of-kin, relict, disponee, or otherwise as the case may be. Executors thus appointed are called executors-dative, to distinguish them from executors-nominate who are appointed by will.

The application is made to the Sheriff of the jurisdiction in which the deceased had his ordinary or principal domicile at the time of his death. If the deceased was not domiciled in Scotland, or had no fixed or known domicile, the application must be made to the Sheriff of Edinburgh.<sup>(n)</sup>

**4. Intimation.**—Intimation of the petition is made at the Court-house, and by publication in the Record of Edictal Citations. The publication at the Court-house is done by the Clerk affixing a full copy of the petition on the door of the

(k) 21 & 22 Vict. c. 56, § 2.

(l) *Supra*, p. 370.

(m) *Supra*, p. 534.

(n) 21 & 22 Vict. c. 56, § 3; 11 Geo. IV. & 1 Will. IV. c. 69, § 31.

Court-house, or in some conspicuous place of the Court, and another copy in the Clerk's office in such manner as the Sheriff may direct. The wording of the Act (§ 4) is obscure as to whether both of these copies must be put up. In strictness, and especially looking to the wording of the relative schedule, one should be enough; but for safety it is the usual practice to put up two. The publication in the Record of Edictal Citations is made by inserting in it the names and designations of the petitioner and of the deceased, the place and date of the death, and the character in which the application is made. These particulars are supplied to the Keeper by the Clerk, and after being printed and published,<sup>(o)</sup> a certified copy of the publication is returned to the latter, who is then in a position to give the certificate of due intimation required by the Statute.<sup>(p)</sup>

**5. Calling of the Petition.**—The petition is called in Court on the lapse of nine days (that is on the tenth day) after the date of the certificate of intimation.<sup>(q)</sup> If appearance is made for any party entitled to oppose the appointment, a record must be made up in the ordinary form. Where there is no opposition, applications from the next-of-kin or from the relict are generally granted at once, it not being usual to require evidence of the relationship. In applications from others, their title to the office must be produced, and must be satisfactory. Thus, an applicant for the office as disponent must produce a valid disposition; and an applicant for the office as creditor must produce either a liquid ground of debt or a decree constituting it.

(o) 21 & 22 Vict. c. 56, § 4.

certificate is now regulated by the Act of 1876, § 44.

(p) *Ibid.* §§ 4 and 5; A. S. 19th March, 1859, §§ 1-4. The form of the

(q) 21 & 22 Vict. c. 56, § 6.



**6. Decree and Extract.**—The requisite publication having been made, and (where necessary) the requisite evidence having been adduced, a decree appointing the applicant executorial in the proper capacity is pronounced. This decree may be extracted on the expiration of three lawful days after it has been pronounced.<sup>(r)</sup> This extract, however, is not the executor's completed title to administer the estate. It is rather, as will presently be more fully explained (*infra*, art. 11), a copy issued to enable the executor to commence legal proceedings against parties who are disputing liability to the deceased. The completed title is not issued until the inventory duty has been paid to the Government, upon which happening the executor is confirmed.

**7. Competition for Office of Executor.**—When the appointment of an executor is opposed, the opposition usually resolves itself into a competition for the office. In this case a second petition is usually presented by the competing party, and of this either the Clerk or the party, as the Sheriff may direct, must make special intimation to the first petitioner, as well as to all executors already decerned or confirmed to any portion of the deceased's personal estate.<sup>(s)</sup> The petitions are usually conjoined, and then the question which competitor has right to the office is fairly raised, and can be properly decided by the Sheriff.<sup>(t)</sup>

In competitions for the office, competitors are preferred in the following order—(1) executors-nominate; (2) general disponees or legatees; (3) the next-of-kin in their order,

(r) 21 & 22 Vict. c. 56, § 6.

(s) Act of 1876, § 44; Act of 1858, § 5; A. S., 19th March, 1859, § 5. A second petition is presented in time to compete, if it come before the first

petitioner has confirmed; *Webster v. Shireess*, 25th Oct. 1878, 6 R. 102. After that, the remedy is by reduction.

(t) *Ersikine*, 3, 9, 32.

those of the same degree (who apply) taking the office jointly, and the nearer degree excluding the more remote; (4) the widow; (5) creditors; and (6) special legatees. Persons who do not fall within any of the foregoing classes may also be appointed. Thus a mother who under the Moveable Succession Act of 1855 succeeds to part of the intestate estate of her deceased son, may be appointed his executrix, though (strictly speaking) she is not one of his next-of-kin.<sup>(u)</sup> In the same way, although a husband could not formerly be appointed executor on his deceased wife's estate, it would appear that should he now succeed to any of her property under the Married Women's Property Act of 1881, he might be appointed her executor. Parties claiming under such rights are apparently preferred after the next-of-kin. Where it appears that two parties have an equal interest in the estate, they are appointed jointly, and it is immaterial whether they claim in the same or different capacities.<sup>(u)</sup>

Formerly, the Commissaries were in use to appoint the Procurator-fiscal of their Court where no other person applied, but this has long been in disuse. Where subjects of foreign States die in Scotland, the consul, vice-consul, or consular agent may be appointed executor, if there be no other person rightfully entitled to administer the estate.<sup>(v)</sup>

**8. Interim Custody of Estate.**—Where a person dies leaving no person to take charge of his estate, any one interested may apply to the Sheriff to give authority to the

<sup>(u)</sup> Muir, 3rd Nov. 1876, 4 R. 74. The petitioner was appointed "executrix *qua* mother."

<sup>(v)</sup> 24 & 25 Vict. c. 121, § 4; and see M'Laren on Wills and Succession, vol. 2, pp. 148, 149, and 150 (from

which much of the paragraph above has been condensed), for the authorities, which are not given here—the question who is entitled to have the office of executor being one of law and not of process.

Clerk of Court to inventory the effects, seal up the repositories, and make provision for safe custody until some person with a proper title shall be appointed. It would seem also that the Sheriff, on such a case coming to his knowledge, might give the instruction *ex proprio motu*. The power, however, is merely ministerial, and is exercised for the sake only of taking care of property which no one else is taking care of. Where there are persons disputing about the right to the custody, the Commissary (as such) could not formerly take the custody from the person who actually had it, and give it to a neutral person.<sup>(w)</sup> But, as in such cases a summary application could always and may still be made to the Sheriff, the point is not of much consequence.

**9. Appointment of Factors.**—In the Commissary Court it has been the practice from time immemorial to nominate factors to act as executors for those who are themselves incapacitated from acting. The same power may of course be exercised now by the Sheriff. It is in the case of pupils that the power is most frequently called into use, but the principle applies equally to cases where the incapacity arises from any other cause. It does not however seem to apply to cases where the party having right to the office is not unable but is simply unwilling to act. The application is made at the suit of any interested party. There is some diversity as to the shape in which the appointment is made. In some Courts the pupils are appointed executors and then the factor is appointed to act for them. In other Courts, and this seems

<sup>(w)</sup> *Milligan v. Milligan*, 17th Jan. 1827, 5 S. 206. It would be questionable, if it were worth questioning, whether this decision was altogether satisfactory. In older times the Com-

missary Courts exercised powers of an extensive kind in such matters, and these powers do not seem to have been curtailed by the Legislature.

the preferable way, the factor is appointed to the pupils, and is then appointed "executor *qua* factor." In either case the result is the same. The factor finds caution before confirmation, and has all the ordinary powers and duties of an executor. His office is not within the sphere of the Judicial Factors Act of 1880, or the Pupils Protection Act of 1848.(x)

**10. Executor Dying before Confirmation.**—Where an executor dies after having been nominated by will, or appointed by the Sheriff, but before confirming, there is sometimes a little complication in regard to appointing another executor. In the case of the deceased executor having been one of the next-of-kin, there is not much difficulty, because (by Statute) the right of such next-of-kin transmits to their representatives, so that confirmation may be granted to the representatives in the same way as it might have been granted to the original next-of-kin.(y) The representative will, however, have to present a new petition, and get himself decerned executor to the intestate in the ordinary way. In the case of the executors who do not belong to the next-of-kin, a double confirmation may be necessary. The representative of the deceased executor may confirm to the executor, including in the inventory, as part of his effects, the beneficial interest, if any, which he had in the estate of the first deceased. But it is only this beneficial interest which the representative can take up, because the office of executor, in so far as it is that of a trustee, is not transmissible. The office goes to the next in right.(z)

(x) Alexander's Practice, p. 54; Thoms on Judicial Factors, by Fraser, p. 517; *Johnstone v. Lowden*, 15th Feb. 1838, 16 S. 541; and *supra*, p. 429.

(y) 4 Geo. IV. c. 98, § 1.

(z) M'Laren, *ut supra*, pp. 153, 154.

Alexander's Practice of the Commissary Courts, p. 54. Although the law admits of no doubt, the error of treating the office as transmitting to the executors of the executor (as it does in England) is said to be very common.

## CONFIRMATION OF EXECUTORS.

**11. How Executors Confirmed.**—The title which a person acquires by being nominated to the office of executor by a will, or appointed to it by the Sheriff, is a title to sue for, but not a title to discharge, the debts due to the deceased. On the strength of his nomination or appointment, the executor may raise and conduct an action for a debt due to the deceased; but before he can extract the decree, or enforce payment, or give a valid discharge, he must be “confirmed” to the office. This is done on his producing to the Clerk of Court his title to the office, with an inventory of the deceased’s moveable estate, stamped with the proper amount of duty,<sup>(a)</sup> and duly sworn to by him as correct, and in certain cases, on his finding caution (art. 12) for the due performance of his duties. The confirmation is completed in the Court which appointed, or, had it been necessary, could have appointed the executors.

The duty of seeing that the title to the office and the inventory are complete, before issuing the confirmation, lies (practically) with the Clerk of Court, to whom the matter is left, unless the Sheriff’s attention is specially called to the case. Wherever any doubt appears to exist as to the right of the applicant to obtain confirmation, the Clerk of Court should lay the matter, or cause the parties to lay it, specially before the Sheriff for his instructions. Such doubts occur when questions are possible as to whether a will produced is sufficiently attested. In all such cases the Clerk of Court—should he desire to save himself from the responsibility he might otherwise incur by issuing a confirmation when he ought not to have done so—may have the Sheriff’s instructions in writing.

(a) 44 & 45 Vict. c. 12, § 28, allows debts and funeral expenses to be deducted.

The whole estate, so far as known, must be included in the inventory,(b) except in the case of an executor-creditor, who confirms only to so much of the estate as will be sufficient to pay his debt. In the case of an executor-creditor there is the further peculiarity that notice of the application for confirmation must be inserted at least once in the *Edinburgh Gazette* immediately after being made.(c)

The inventory and the will, where there is one, are recorded in the appropriate Court Books. On the recording being complete, the Clerk issues the confirmation. This writ is substantially the same in testate and intestate succession; but the narrative varies slightly to suit the circumstances, and in the former it receives the uncouth name of "testament-testamentar," and in the latter of "testament-dative," signifying respectively "probate" and "letters of administration" in the ordinary English language. The writ runs in the name of the Sheriff; narrates the title to the office of executor, and the giving up of the inventory; and proceeds formally to make or ratify and confirm the appointment, and to give full power to the executor to administer the personal estate of the deceased. It is still sealed with the old seal of the Commissary Court, and then makes the complete title to administer the estate.(d) The forms are provided in the Act of 1858.(e)

**12. When and to what amount Caution must be found.—**Caution had formerly to be found by all executors, but executors-nominate are now exempt. In the case of other executors, the caution which has to be found is for the amount confirmed, unless the Court sees fit to restrict the

(b) 4 Geo. IV. c. 98, § 3. The debts and funeral expenses are stated in a schedule, and the duty is paid on the net amount; 44 & 45 Vict. c. 12, § 28.

(c) 4 Geo. IV. c. 98, § 4.

(d) 39 & 40 Vict. c. 70, § 35.

(e) Schedules (D) and (E).

amount. Where an executor desires to have the amount of the caution restricted, he presents a short petition stating the grounds on which he proposes that this should be done. Of this petition the Sheriff orders such publication as he thinks right, usually by advertisement once or twice in a newspaper circulating in the county, and then he disposes of it according to his best discretion.(f)

**13. Eiks to Inventories.**—Where it is discovered by the executor that he has omitted to give up some of the property belonging to the deceased, he must cause an additional inventory to be given up ; and on this he gets a new confirmation. This confirmation will be almost *verbatim* the same as the original one, but the giving up of the additional inventory will of course be narrated, and power will be given to administer the effects specified in it. This proceeding is called making an “eik” or addition to the inventory, and it is carried through before the Clerk in the same way as a first confirmation.

**14. Confirmation *ad non executa, omissa vel male appreciata*.**—These kinds of confirmation are seldom required now. The confirmation *quoad non executa* may be used where a confirmed executor has died without getting the funds transferred to himself as executor. When it is required, a special petition must be presented, to be dealt with in the ordinary way. Confirmations *quoad omissa vel male appreciata* are almost unknown, and usually an eik to the inventory serves all the purpose. Sometimes, however, they

(f) 4 Geo. IV. c. 98, § 2; Alexander's Practice of the Commissary Courts, pp. 58 and 173. The bond may be in the ordinary form, but sometimes a peculiar form is used, which

is engrossed in a book kept in the Clerk's office; *Smith v. Kerr*, 30th Oct. 1868, 7 M. 42. Women are not taken as cautioners; French, 16th May, 1871, 9 M. 741.

are used by a second executor-creditor desirous of taking up debts which a first executor-creditor has neglected or found unnecessary for his purpose. The applicant proceeds as in the ordinary case.

**15. Of confirming to English or Irish Property.**—When it is desired, personal property situated in England or Ireland may be included in the inventory. The person making the affidavit to the inventory includes, in such a case, a statement in it that the deceased died domiciled in Scotland. The confirmation then proceeds as usual, the Clerk of Court inserting in it, or in a note upon it, the statement about the domicile. The confirmation, when thus complete, is presented by the executor to the Principal Probate Court in England or Ireland. A copy is deposited with the registrar, and the confirmation is then sealed with the seal of the English or Irish Court, and thereafter it has the same force and effect in England or Ireland, as the case may be, as if a probate or letters of administration had been granted.<sup>(g)</sup> “Eiks” or additional confirmations may be sealed in the same way, and it is immaterial, whether the original confirmation have been sealed, or whether the new one contains any personal property situated in Scotland.<sup>(h)</sup> Where a party domiciled in Scotland has died vested as trustee in personal property in England or Ireland, a note to that effect containing a statement of the funds in question may be appended to the confirmation and signed by the Clerk of Court. Such a confirmation may then be sealed in England or Ireland, which will confer on it the effect of probate or letters of administration.<sup>(i)</sup>

(g) 21 & 22 Vict. c. 56, §§ 12 and 13; 39 & 40 Vict. c. 70, § 41.

illustrates some of the difficulties which occurred before this enactment.

(h) 39 & 40 Vict. c. 70, § 41. Ryde, 10th May, 1870, 39 L.J. (P. & M.) 49,

(i) 39 & 40 Vict. c. 70, § 42.



**16. Certifying English or Irish Probates or Letters of Administration.**—When probates or letters of administration, granted in England or Ireland to persons domiciled in those countries, embrace property situated in Scotland, they may be produced in the Sheriff Court at Edinburgh, and a copy deposited there; and (on a certificate being indorsed on them by the Edinburgh Commissary-Clerk that these things have been done) they become, when duly stamped, as available for recovering the property in Scotland as a confirmation would be. Before being presented in Edinburgh, the probate or letters must have a memorandum written upon them by the proper officer of the English or Irish Court, bearing that the deceased died domiciled in England or Ireland, as the case may be.(j)

#### SMALL SUCCESSIONS.

**17. Succession Acts of 1875 and 1876.**—Where the whole assets of a personal estate (without deduction of debts or funeral expenses) do not exceed £300 in amount, certain facilities are given for taking up the succession. These facilities were first granted by an Act passed in 1875 for intestate estates,(k) and then extended in 1876 to testate estates.(l) The limit was originally £150 of net value, and the benefits of the former Act were confined to widows and children. It was the Customs and Inland Revenue Act of 1881(m) which altered the limit to what it now is, and at the same time extended the benefits to any applicant for representation. This Act likewise contains a provision that “where-soever the deceased may have been domiciled,” the Acts may be used. As the Act of 1881 has not made any alteration on

(j) 21 & 22 Vict. c. 56, § 14; 22 Vict. c. 30.

(k) 38 & 39 Vict. c. 41.

(l) 39 & 40 Vict. c. 24. This Act took “real” estate into account.

(m) 44 & 45 Vict. c. 12, § 84.

the ordinary rules as to jurisdiction, this provision must be worked out in conformity with them. It will still be necessary, therefore, in the case of a person domiciled in Scotland to proceed in the county where the deceased had his ordinary or principal domicile, and in the case of persons domiciled out of Scotland, the jurisdiction will (as at present in other cases of the like kind) be with the Sheriff of Edinburgh.<sup>(n)</sup>

The applicant for representation must go to the Clerk of Court, who will prepare and fill up an inventory and relative oath, which will be taken in the usual way ; and, on the applicant in testate successions, producing the will or other writing naming him executor, and, in intestate successions, finding caution, the inventory is recorded and confirmation expedited. No fees can be charged except those specified in the Acts, but the inventory, if over £100, must be stamped. The Clerk may require proof of the identity and relationship of the applicant, and is enjoined in doubtful cases to be satisfied before he proceeds that the estate is under the proper limit of value. If it is afterwards discovered that the estate exceeds £300, the stamp duty for the proper value must be paid without deduction for what has been already paid ; and as this is the only penalty expressly attached, it is to be presumed that the discovery will not otherwise affect the validity of the proceedings.

The confirmation, when granted, may be sealed in England or Ireland, on payment of two shillings and sixpence.

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(n) *Supra*, art. 3.

## CHAPTER III.

## SUCCESSION TO ABSENTEES.

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| 1. <i>Presumption of Life Act—Jurisdiction.</i> | 2. <i>Form of Proceedings.</i> |
|   | 3. <i>Scope of the Act.</i>    |

**1. Presumption of Life Act—Jurisdiction.**—In the case of persons who have disappeared and have not been heard of for a certain number of years, the Presumption of Life Limitation Act of 1881 gives certain powers for dealing with their property as if they were dead,<sup>(a)</sup> which vary according to the length of time during which they have been amissing.

Where the estate in Scotland of the absent person “does not exceed in amount or value the sum of £150,” the necessary application may be made in the Sheriff Court.<sup>(b)</sup> The wording of the clause giving this jurisdiction is as remarkable as its limited scope. If the words “amount” and “value” mean the same thing, the estate to be dealt with will mean the net amount of the assets of the absent person under deduction of any debts to which they are subject. If the words mean different things—and unless they mean something different, there was no sense in using both—then if the gross amount exceeds £150, there is no jurisdiction. The “amount or value” is apparently to be taken at the date of the application. Under the other parts of the Act it is provided that the estate may be either heritable or moveable. If the estate be heritable, its value is to be

(a) 44 & 45 Vict. c. 47.

(b) Act, § 12.

ascertained in terms of the provisions of the Sheriff-Court Act of 1877. If the estate be moveable, there is no provision for ascertaining its value, though why it should not have been ascertainable in the same way, it is impossible to say.

The application is to be made in the Sheriff Court of the county in which the estate or the greater part of it is situated.(c) If the estate is entirely heritable and lies partly in two counties, a mere matter of mensuration will fix the *forum*. If the estate be mixed or wholly moveable, many difficulties will arise, as it will apparently be impossible to take the element of domicile in a particular county into consideration at all. It is possible that the Act intends, as the *forum*, the Court in which an action would have to be raised if it were necessary to enforce payment of the obligations of which the estate consists.

**2. Form of Proceedings.**—The Act makes no provision as to the form of proceedings, beyond saying that there is to be proof of the facts stated in the petition, and such procedure and inquiry, by advertisement or otherwise, as the Sheriff may direct.(d) The petition will, therefore, be in the ordinary form. A strict reading of the Act would imply that the proof should be taken immediately on the presentation of the petition, and in some Sheriff Courts, on the plea that till this has been done the Sheriff cannot know what inquiry or advertisement to direct, this course is followed.(e) In the Court of Session, and in other Sheriff Courts, such intimation by advertisement or otherwise, as the statements in the petition seem to render proper, is first ordered. If the petition is unopposed, proof is then taken, and the question of inquiry or advertisement again considered. If the petition is

(c) Act, § 12.

(d) Act, §§ 1 to 6.

(e) Sellar's Forms, vol. 1, p. 412.

opposed, a record is made up, and the action proceeds as nearly as may be, in the form of an ordinary action. Whether the application be opposed or not, the form of the pleadings, the mode of taking and recording the proof, and the competency of appeals, will necessarily be the same as in ordinary actions.

**3. Scope of the Act.**—The principal provisions of the Act are (1) that after seven years' disappearance (without being heard of), the income of the absentee's estate may be appropriated as if he were dead ;(f) (2) that after fourteen years of such disappearance, the capital of his moveable estate may be appropriated in the same way ;(g) and (3) that after twenty years of such disappearance, the fee of his heritable estate may be appropriated.(h) Its application to such persons is somewhat limited. It applies only to Scotsmen, by origin or former domicile, who alone can be spoken of as having disappeared from Scotland. It, therefore, does not apply to persons whose only connection with Scotland is that of having succeeded to some estate in it.(i) Nor does it apply to all the estate which the absentee might have claimed had he been alive at the date of the application. If, in the course of the proceedings, facts emerge from which the presumption is that the absentee died at a definite date, that will fix the period with reference to which the questions of what property belonged to him, and who were his heirs or executors, will have to be determined. If no such facts emerge, it will be presumed that the absentee died seven years after he was last seen or heard of.(j) The Act, therefore, is of use in disposing of such estate only as he possessed at the date of his disappearance, or acquired before the date of

(f) Act, § 1.

(g) Act, §§ 2 and 4.

(h) Act, §§ 3 and 5.

(i) *Rainham v. Laing*, 2nd Dec. 1881, 9 R. 207.

(j) Act, § 8.

his presumed death, and is of no use for dealing with property which might have belonged to him had he survived that date.(k) Further, the Act applies only to property belonging to the absentees in fee, and is useless for the purpose of extinguishing life-rent interests belonging to them.(l) Lastly, in cases where the Court is empowered to deal with the income only of the estate, it cannot authorise the expenses to be taken out of the capital.(m)

(k) Craig, 20th Jan. 1882, 9 R. 434. the absentee.

(l) Peterhead School Board, 10th Mar. 1883, 20 S. L. R. 497. The petitioner must be entitled to "succeed" to

(m) Douglas, 25th Nov. 1882, 20 S. L. R. p. 164.

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# PART VI.

## OF APPEALS TO HIGHER COURTS.

### CHAPTER I.

#### OF THE VARIOUS MODES OF APPEALING.

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| <ol style="list-style-type: none"> <li>1. <i>The Modes of Appealing.</i></li> <li>2. <i>Unextracted Interlocutors or Judgments.</i></li> <li>3. <i>Extracted Interlocutors or Decrees.</i></li> </ol> | <ol style="list-style-type: none"> <li>4. <i>Small-Debt Court Decisions.</i></li> <li>5. <i>Decisions under Debts-Recovery and other Special Acts.</i></li> </ol> |
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1. **The Modes of Appealing** from the decisions of the Sheriff Courts to higher Courts are not uniform. There are differences in the different forms of action as to the way in which the appeal is to be presented ; as to the Court before which it is to be taken ; and as to the powers of the reviewing Court. And in the same action there are differences as to the form of appeal, according to the stage at which it is taken, and according to the purpose for which it is taken. (a)

(a) In dealing both with the major appeal from the Sheriff to Supreme Courts, and with the minor appeal from Sheriff-Substitute to principal Sheriff, it would have been a great convenience if interlocutors could have been classified (somewhat after the manner of foreign procedure codes) into (1) Preparatory Interlocutors, (2)

Interlocutory Judgments, (3) Final Judgments, and (4) Supplementary Interlocutors. But the use of such exact language in the case of uncoded rules is impossible, and a classification which answered the minor appeal would break down when the major was reached. Indeed with rules wherein such simple words as "final" will be

**2. Unextracted Interlocutors or Judgments.**—In the great majority of actions the appeal for the simple purpose of reviewing the decision of the Sheriff Court is to the Court of Session, and is taken by the appeal which (under the Court of Session Act of 1868) has come in place of the old “advocation.” This form is used in all appeals from decisions in the Ordinary Court, entered before the judgment has been extracted, with the exception (A) of certain special interlocutors, and (B) of the decisions in certain special actions for which other provisions have been expressly made.

(A) The special interlocutors for which there are special modes of appeal are those allowing proof, which (when the pursuer’s claim exceeds £40) may be taken to the higher Court, by a special form of appeal presented under the plea of having the case tried before a jury. There is also a form resembling one of appeal by which parties who are cited in declarators or other actions brought under the Sheriff-Court Act of 1877, or in actions brought under the Employers Liability Act of 1880, may remove the proceedings to the Court of Session.

(B) The actions in which the appeal is incompetent, even before extract, are those summary applications in which warrants on which execution may follow are issued either at once or in shorter than the usual periods for extract. These actions are removings and ejections; petitions for lawburrows; and for warrants to apprehend as *in meditatione fugæ*. In these cases the mode of review is by “note of suspension;” and the essential difference is, that caution to some extent is generally made a condition of staying execution.

found used in three different senses, precision are greater than any one who the difficulties in the way of using has not tried it can well conceive. terms with some moderate degree of



**3. Extracted Interlocutor or Decrees.**—In the Ordinary Court, after decree has been extracted, the mode of review is either by “note of suspension” or by action of reduction. Both of these actions are brought in the Court of Session. Suspension is applicable to those cases in which the extract-decree contains a warrant (not being for expenses) capable of being made the foundation for execution against the goods or person; and (in general) the execution will not be stayed except on caution. Reduction is applicable to all extracted decrees (not being for expenses merely), but does not stay execution.

**4. Small-Debt Court Decisions.**—From the Small-Debt Court the appeal is to the Court of Justiciary, which was selected on account of the convenience given by its holding circuits. The power of the reviewing Court is here strictly limited.

**5. Decisions under Debts-Recovery and other Special Acts.**—From the Debts-Recovery Court the appeal is to the Court of Session, in a form regulated by the Debts-Recovery Act. In the processes for the service of heirs, and in the proceedings connected with ecclesiastical buildings and glebes and entailed estates, the mode of appeal is in each case regulated by the special Statute.

## CHAPTER II. OF APPEALS.

### APPEALS FOR REVIEW.

#### *Introductory—The £25 Limit.*

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| <ol style="list-style-type: none"> <li>1. <i>Appeal in Actions with Pecuniary Conclusions.</i></li> <li>2. <i>Appeal in Actions ad facta præstanda.</i></li> <li>3. <i>Against what Interlocutors.</i></li> <li>4. <i>Interlocutors sisting Process.</i></li> <li>5. <i>Interlocutor giving Interim Decree.</i></li> <li>6. <i>Final Judgments.</i></li> <li>7. <i>Form of Appeal.</i></li> <li>8. <i>Time of Appeal.</i></li> <li>9. <i>Notice of Appeal.</i></li> </ol> | <ol style="list-style-type: none"> <li>10. <i>Transmission of Process.</i></li> <li>11. <i>Printing Papers and Enrolment of Appeal.</i></li> <li>12. <i>Powers of Court of Session.</i></li> <li>13. <i>Hearing, Proof, and Judgment.</i></li> <li>14. <i>Respondent failing to Appear.</i></li> <li>15. <i>Appellant withdrawing Appeal.</i></li> <li>16. <i>Possession Pending Appeal.</i></li> </ol> |
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### REMOVAL APPEALS.

17. *Removal under Act of 1877.*
18. *Appeal for Jury Trial.*
19. *Appeal on Contingency.*

### APPEALS FOR REVIEW.

**Introductory—The £25 Limit.**—At common law, the theory is that every judgment, whether final or interlocutory, which is pronounced by the Sheriff, or by any other inferior judge, is subject to the review of the Supreme Courts. Various restrictions have, however, been placed on the right of appeal, in order that the time of the superior judges and the money of the litigants may not be wasted on matters of small importance. Under the Act of 1853, the power of appealing for review (in any form) is prohibited in civil causes “not exceeding the value of £25 sterling.”<sup>(a)</sup> This was an extension of a provision made by an older Act, by which appeals were pro-

(a) 16 & 17 Vict. c. 80, § 22. This is the same limit as that in which the Sheriff Courts have privative jurisdiction;

*supra*, p. 53. The prohibition against review does not take away all right of appeal, as there seems to be one com-

hibited when the cause did not exceed the value of £12.(b) In ascertaining "the value of a cause" for the purposes of review, the Court of Session has proceeded on extremely stringent principles of construction. When it is ascertained that a cause is not appealable, the Court is also very strict in dismissing the appeal. In many cases it will be found that the objection that the cause is under the value has come from the bench; and even though the parties should expressly renounce the objection, the Court will not entertain the appeal.(c) The reason for this strictness is that the question is one of jurisdiction, and is regulated by statute. In considering whether appellability exists or not, it will be convenient to take, firstly, those actions which contain nothing but pecuniary conclusions; and, secondly, those actions which contain conclusions *ad facta præstanda*, either alone or in combination with other conclusions;—premising always that a general exemption from the restrictions is conferred by the Act of 1877 on the limited class of actions brought under it.(d)

**1. Appeal in Actions with Pecuniary Conclusions.**—In these actions the first thing to be looked at is the value concluded for in the petition; and if the sum concluded for, with interest to the date of the judgment complained of,(e) is above

petent on much the same grounds as those in which appeal is competent in the Small-Debt Court; *Sandys v. Lowdon*, 26th Nov. 1874, 2 R. (J. C.) 7. See also 50 Geo. III. c. 112, § 36; *Dick v. Gt. N. of Scot. Railway*, 8th Oct. 1860, 3 Irv. 616; *Miller v. Crawford*, 15th Jan. 1881, 8 R. 385; and *Mackay's Practice*, vol. ii. p. 456. Whether this appeal is to be taken to the Court of Session or Court of Justiciary seems unfortunately to be doubtful; *Traill v. Chalmers*, 14th

March, 1883, 20 S. L. R. 509.

(b) 20 Geo. II. c. 43, § 38, which was an extension of the Act 1663, c. 9, "anent the discharge of advocations for sums within 200 merks."

(c) *Singer Manufacturing Co. v. Jessiman*, 14th May, 1881, 8 R. 695.

(d) 40 & 41 Vict. c. 50, § 9 (3).

(e) An action for £25, with interest from citation, may be appealed; *Martin v. Robertson*, 10th July, 1872, 10 M. 949.

£25, that shows that there is appellate jurisdiction.(f) The mere sum of money concluded for is, however, not the only thing to be looked at; and though the pursuer may ask for a smaller balance than £25, yet if the petition show that this balance is brought out by giving credit for such an amount of independent counter accounts as would otherwise have left the debt due by the defender larger than £25, there is jurisdiction.(g) On the other hand, if the counter accounts which are credited from part of the same transaction as that on which the principal claim is founded, and the whole balance claimed does not exceed £25, there is no jurisdiction.(h) Expenses, it is held, are not to be reckoned in making up the amount to £25.(i)

If the petition, thus interpreted, gives jurisdiction to the appellate Court, the record is not to be looked at, and it is immaterial though the value shown from it be much less. Thus, in an action for £32, where £26 was paid to account in the course of the proceedings, and the litigation was entirely as to the remaining balance of £6, the value of the cause was nevertheless held to exceed £25.(j) On the same principle, in an action brought for aliment, where—(the person to be alimented having died in the course of the proceedings)—the pursuer restricted his claim to the amount of £13, 6s. 8d. (all he had actually paid out), the value was held to exceed £25.(k) This principle is carried out (consistently) to the

(f) *Mitchell v. Murray*, 10th March, 1855, 17 D. 682. It is immaterial that it is asked from several defenders, and that the sum payable by each is less than £25; *Dykes v. Merry*, 4th March, 1869, 7 M. 603; *Nelson v. Browne*, 10th June, 1876, 3 R. 810.

(g) *Inglis v. Smith*, 17th May, 1859, 21 D. 822.

(h) *Stevens v. Grant*, 17th Oct. 1877, 5 R. 19.

(i) *Hopkirk v. Wilson*, 21st Dec. 1855, 18 D. 299.

(j) *Wilson v. Wallace*, 6th March, 1858, 20 D. 764.

(k) *Bule v. Stiven*, 5th Dec. 1863, 2 M. 208.

conclusion that, though the whole value at stake may have come down to nothing at the date of the decree, the right of appeal remains as to the question of expenses so long as the merits remain open for discussion.<sup>(l)</sup>

If the petition does not show jurisdiction, the next thing is to look at the record; and if the value of the cause estimated by trying what would be the effect of a judgment in favour of either party is over £25, there is appellate jurisdiction. Thus, in an action for £23, the Court of Session held that they had jurisdiction, because the question tried was the validity of a contract, the consideration for which had been £28.<sup>(m)</sup> This decision could more easily have been understood had the contract been one the fulfilment of which was still possible; but as the contract had been broken, it would have seemed more natural to have said that the value of the cause was not the original consideration, but the damage occasioned by the breach, which was all that was or could be claimed. Where the contract founded on is a continuing one, and the question decided between the parties will be *res judicata* as to a larger amount than £25, there is appellate jurisdiction, although the amount involved in the actual action be less than £25; and for this the reasons are easily understood.<sup>(n)</sup> It is not, however, enough to create appellability, to show that the liability may continue, or that the same question may recur between the same parties. Thus, in an action for aliment, concluding for an amount not exceeding £25, the fact that more aliment will be required should the pursuer's ill health continue,

(l) *Fleming v. North of Scotland Bank*, 20th Oct. 1881, 9 R. 11; *Robertson v. Wilson*, 3rd March, 1857, 19 D. 594. The Court of Session, however, discourages appeals on the mere question of expenses.

(m) *Brydon v. Macfarlane*, 2nd Nov. 1864, 3 M. 7.

(n) *Drummond v. Hunter*, 12th Jan. 1869, 7 M. 347; *Cunningham v. Black*, 9th Jan. 1883, 10 R. 441.

will not give appellate jurisdiction.(o) And in an action for a rate or assessment of an amount not exceeding £25, there is no appeal, although the same case may arise again between the same parties,(p) the remedy in this case, if the opinion of the Court of Session is wanted, being to bring a declarator.(q)

The preceding rules do not apply where what is virtually a second litigation has commenced about a smaller matter than that embraced in the original petition or record. Thus, after a landlord had sequestered, and his rent and expenses had been paid, a small balance left was consigned, and about it the tenant's other creditors had a litigation. It was held that there was no appeal. It is evident that the excellent principle here adopted may have a wide application.(r)

**2. Appeal in Actions *ad facta præstanda*.**—In actions *ad facta præstanda*, and in interdicts, where a pecuniary value is not directly at stake, there is always appellate jurisdiction. Thus the Court of Session held that the right of review existed in an action as to the ownership of an animal, although it appeared from the record that the animal had been sold at a public sale for the sum of £3, 5s.(s) And again, they held the right to exist in a litigation about the possession of certain documents of debt, although the whole amount for which they were good was only some £16.(t) These decisions were arrived at

(o) *Macfarlane v. Stornoway Friendly Society*, 27th Jan. 1870, 8 M. 438.

(p) *Heddie v. Gow*, 26th Nov. 1880, 18 S. L. R. 96.

(q) *Hogg v. Auchtermuchty Parish*, 22nd June, 1880, 7 R. 986.

(r) *Dobbie v. Thomson*, 19th June, 1880, 7 R. 983.

(s) *Purves v. Brock*, 9th July, 1867,

5 M. 1003.

(t) *Henry v. Morrison*, 19th March, 1881, 8 R. 692. A decision that a sequestration for £13 of rent might be appealed because under it goods exceeding £25 of value might be sequestered, seems to me questionable; *Thomson v. Barclay*, 27th Feb. 1883, 10 R. 694. Such a principle might go far, but

upon the ground that the parties might have reasons for contending about the property of the things in dispute, the importance of which was not measured by their pecuniary value.

Where actions of this kind contain alternative conclusions, one of them being for money, it depends on the amount of the latter whether there is review. If the conclusion for the money—of course not exceeding the value of £25—is the principal conclusion, and the delivery, or other remedy, is asked only in the event of the money not being paid, it is clear that there is no review;(u) and it has recently been settled that even though the delivery be the principal matter, and the money be asked “failing delivery” only, there is nevertheless no appellate jurisdiction.(v)

**3. Against what Interlocutors.**—The Act of 1853 prohibits appeals against all interlocutors except those—

- (1.) Sisting process;
- (2.) Giving interim decree for the payment of money; and
- (3.) Disposing of the whole merits of the cause.(w)

Interlocutors pronounced by the Sheriff-Substitute may be reviewed by the Court of Session though they have not been appealed to the principal Sheriff. The opinion which the Court of Session at one time intimated against the expediency

there was another ground of decision, namely, that there were conclusions for caution and removing, on which the case might be better rested.

(u) *Cameron v. Smith*, 24th Feb. 1857, 19 D. 517. It would appear that if the value were stated indefinitely, say at £10, “or such other sum as shall be ascertained to be the price or value,” there would be jurisdiction, because the summons would not show the value to

be under £25; *Shotts Iron Co. v. Kerr*, 6th Dec. 1871, 10 M. 195; *Aberdeen v. Wilson*, 16th July, 1872, 10 M. 971.

(v.) *Singer Manufacturing Co. v. Jesiman*, 14th May, 1881, 8 R. 695.

(w) 16 & 17 Vict. c. 80, § 24. It will be seen that this gives a much smaller sphere of appellability than is given from Sheriff-Substitute to principal Sheriff, *supra*, p. 318.

of appealing before both Sheriffs had considered the matter(*x*) has not found expression in recent cases.

**4. Interlocutors Sisting Process** require no observation. The right of review has been granted, apparently on the ground that to delay the pursuer's claim may practically be to defeat it.*(y)*

**5. Interlocutors giving Interim Decree** for the payment of money are reviewable, however small the amount may be which is involved, provided the action be one in which appeal is otherwise competent, and the interim judgment be such as to authorise interim decree being extracted. Leave to appeal is not now requisite.*(z)* It will be observed that the Act of 1853 has limited the power of review, in the case of interim decrees, to those for the payment of money.*(a)* Where, therefore, a judgment is of such a kind that it neither orders payment of money nor disposes of the whole merits, there is no appeal.*(b)* In like manner, when interim interdict has been refused there is no appeal.*(c)* An interim award of expenses is not held an interim order for payment of money within the meaning of the Act.*(d)*

**6. Interlocutors disposing of the whole Merits** are those

*(x)* *Malcolm v. Ballandene*, 30th June, 1835, 13 S. 1021.

*(y)* An interlocutor "equivalent to" sisting process can be appealed; *Watson v. Stewart*, 24th Feb. 1872, 10 M. 494.

*(z)* *Erskine v. Lang*, 18th Dec. 1872, 11 M. 229.

*(a)* Under this an interim warrant to an officer of court to pay money can be appealed; *Baird v. Glendinning*, 16th Oct. 1874, 2 R. 25.

*(b)* *M'Kenzie v. Bouttellean*, 16th June, 1855, 17 D. 943. As to whether, when such an interlocutor has been extracted, there is not a power of suspending a threatened charge, see *infra* Chap. III.

*(c)* *Cathcart v. Sloss*, 11th Feb. 1865, 3 M. 521. As to whether there is no redress, if it be granted, see *infra*, Chap. III. p. 501.

*(d)* *Notman v. Kidd*, 9th Feb. 1872, 9 S. L. R. 292.



which leave nothing to be done in the action except to tax or decern for expenses,(e) or which actually put the pursuer or defender out of Court.(f) What is called by the Sheriff-Court Act of 1853, an "interlocutor disposing of the whole merits" is called by the Court of Session Act of 1868 a "final judgment," and a definition is there given. According to it (§ 53) "the whole cause has been decided in the Sheriff Court when an interlocutor has been pronounced by the Sheriff, which either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause." Interlocutors which dispose of the whole cause are thus interlocutors on the merits, although technically the merits may not have been touched. For example, judgments by default,(g) and judgments sustaining dilatory defences, are appealable.(h) It is provided by the Act of 1853, that it shall not be necessary that the question of expenses have been disposed of;(i) and no express repeal of this provision having been

(e) *Per* Lord President in *M'Kenzie v. Bontelleau*, *supra*, note (b); 31 & 32 Vict. c. 100, § 53.

(f) Hence an interlocutor sustaining the relevancy of the petition and allowing a proof cannot be appealed; *Shirra v. Robertson*, 7th June, 1873, 11 M. 660. Nor can an interlocutor sustaining the competency of a multiplepoinding, and ordering claims; *Gordon v. Graham*, 26th June, 1874, 1 R. 1081. Compare *Adam v. Kinnes*, 27th Feb. 1883, 10 R. 670. An interlocutor finding an action irrelevant or incompetent, would of course be appealable.

(g) *Martin v. Haddon*, 3 Dec. 1833, 12 S. 155. *Robb v. Eglin*, 18th May, 1877, 14 S. L. R. 473. The Court, however, object to appeals, *causa non cognita*, and repono only on payment of expenses, *Morrison v. Walker*, 24th June, 1871, 9 M. 902; and where there has already been an appeal to the principal Sheriff are very reluctant to interfere with his discretion; *M'Gibbon v. Thomson*, 14th July, 1877, 4 R. 1085; *Smith v. Inglis*, 14th June, 1881, 18 S. L. R. 563.

(h) *Whyte v. Gerrard*, 30th Nov. 1861, 24 D. 102.

(i) 16 & 17 Vict. c. 80, § 24.

made by the Act of 1868, it was thought for many years after its passing that the provision still subsisted. It was, however, pointed out by the Court of Session in 1877 that this was an error, and that the clause was inferentially repealed. Until, therefore, the question of expenses is determined, the subject matter is not exhausted, and there is no appeal to the Court of Session.(j) Even if expenses be expressly reserved there is no appeal.(k) It is not, however, necessary that the expenses, if found due, have been taxed, modified, or decerned for.(l) If the final judgment have become unappealable, through having been extracted or through the lapse of time, there is no appeal against the supplementary interlocutors which deal with the last mentioned points.(m)

**7. Form of Appeal.**—The appeal is taken by the appellant or his agent either writing a note of appeal on the interlocutor sheet, or lodging a separate note of appeal. This is done in the Sheriff Court, and the Sheriff-Court agent will therefore be the proper agent to sign this note. It is to be remembered that an agent must have special authority from his client to do this.(n) The note may be in the following terms:—

(j) *Greenock Parochial Board v. Miller*, 25th May, 1877, 4 R. 737; *Russell v. Allan*, 18th Oct. 1877, 5 R. 22; *Malcolm v. M'Intyre*, 19th Oct. 1877, 5 R. 22. These cases are not easily reconciled with *Duke of Roxburghe*, 26th May, 1875, 2 R. 715, where an appeal by competitors whose claim had been refused in a process of competition, was sustained though the question as to their expenses was undecided.

(k) *Greenock case*, preceding note. Where expenses are reserved when dealing with the merits, it is the interlocutor disposing of the expenses which

is the final judgment; *Baird v. Barton*, 22nd June, 1882, 9 R. 970.

(l) 31 & 32 Vict. c 100, § 53.

(m) *Tennents v. Romanes*, 22nd June, 1881, 8 R. 324. If after a final judgment became unappealable through lapse of time, without having been extracted, the loser were to refer the matter to the gainer's oath, it is not clear what would be the position of the interlocutor dealing with the deposition; *M'Laren v. Shore*, 8th June, 1883, 20 S. L. R. 638.

(n) *Stephen v. Skinner*, 17th Dec. 1863, 2 M. 287.

"The pursuer (or other party) appeals to the Division of the Court of Session." It must specify the Division, and must be dated.(o) The appellant is not required to give security for the expenses to be incurred in the appeal.(p)

**8. Time of Appeal.**—The appellant has fourteen days after the date of the appealable judgment—within which it cannot be extracted,(q)—allowed to him for the purpose of appealing. He can appeal at any time within that period. And so long as the judgment in question has not been actually extracted or implemented, he may still appeal after the expiry of that period at any time before the lapse of six months from the date of the final judgment in the cause.(r) In the case of appeals against interlocutory judgments, there can scarcely be any question as to the date from which the respective periods of fourteen days and six months run. In the case of appeals from other judgments, they begin to run from the date of the one which is "final" in the sense which has been explained, and it is of course quite immaterial at what date any supplementary interlocutor taxing, modifying, or decerning for expenses may have been pronounced.(s)

**9. Notice of Appeal.**—Within two days after the date of any appeal being taken, the Sheriff-Clerk must send written notice of it to the respondent or his agent.(t) If this notice

(o) 31 & 32 Vict. c. 100, § 66.

(p) *Ibid.* § 65.

(q) *Supra*, p. 332; 39 & 40 Vict. c. 70, § 32. If the Sheriff allowed extract in a shorter period, it would appear that the appealing days would end on the extract being made.

(r) 31 & 32 Vict. c. 100, §§ 67 and 68. "Implement" must here have its natural meaning, as (the judgment

not having been extracted) there can be no question of poiding or imprisonment.

(s) *Thompson v. King*, 19th Jan. 1883, 10 R. 469; *Baird v. Barton*, *supra*, note (k).

(t) The Sheriff-Clerk should mark on the interlocutor sheet a certificate of this intimation; *Chisholm v. Marshall*, 17th Jan. 1874, 1 R. 388.

be omitted, the Court of Session must take such steps as it thinks proper to remedy the inconvenience or disadvantage thereby occasioned, but the omission does not invalidate the appeal.(u)

**10. Transmission of Process.**—Within the same two days the Clerk of the Sheriff Court must transmit the process to one of the clerks of the Division to which the appeal is taken. This transmission must be made by the Sheriff-Clerk, and he must not give the process to the agent for either party to transmit.(v) On receiving the process the Court of Session Clerk must mark upon the appeal the date of receipt.(w)

**11. Printing Papers, and Enrolment of Appeal.**—The regulations for printing and enrolling the appeal which were contained in the Act of 1868, have been somewhat changed by the Court of Session under the powers which the Act conferred upon them. They are contained in an Act of Sederunt passed in March, 1870, which will be found in the Appendix. Generally the regulations are :—

- (A.) The appellant must within fourteen days after the appeal has been received, print and duly lodge the note of appeal, record, and interlocutors, and the oral(x) proof, if any; unless he have (on enrolment within eight days) obtained from the Court (or in vacation time from the Lord Ordinary on the Bills) leave to dispense with printing in whole or in part. When the appellant desires such a dispensation, he must be careful to ask it within the first

(u) 31 & 32 Vict. c. 100, § 70.

(x) *Muir v. Mackenzie*, 15th October,

(v) *Innes v. Fife*, 18th June, 1859, 12 D. 1007.

1881, 9 R. 10. Documentary evidence is in time if printed for the hearing.

(w) 31 & 32 Vict. c. 100, § 71.

eight days, otherwise he will have to wait till he can ask to be reponed under the third regulation.(y)

- (B.) If he fail to print in proper time he is held as having abandoned his appeal, unless he be reponed within eight days.
- (C.) Within eight days, however, after the appeal is held to be abandoned, the appellant may move the Court (or in vacation time the Lord Ordinary on the Bills) to be reponed, which motion may be granted on cause shown, and on such terms as to printing or expenses as shall seem just. To get the benefit of this provision a reponing note is unnecessary.(z) What will be a sufficient excuse for not printing in time will depend on circumstances. That there were verbal communings going on for a settlement may not be accepted.(a) On the other hand, short delays caused by small accidents or omissions,(b) or by difficulties in communication,(c) have been excused on payment of expenses.
- (D.) Within the same eight days the respondent may print the papers. If he do, he may thereafter insist on the appeal; and so may the appellant.
- (E.) After the eight days, if the appellant have not been reponed, and the respondent has not printed, the interlocutors become final, the cause is retransmitted to the Sheriff Court, and (on being asked) the Sheriff

(y) *Allan v. Sandeman*, 4th March, 1881, 8 R. 563.

(z) *Greig v. Sutherland*, 3rd Nov. 1880, 8 R. 41.

(a) *Robertson v. Barclay*, 27th Nov. 1877, 5 R. 257.

(b) *Greig*, note (s), delay of two days by counsel's absence from town; Lat-

*timer v. Anderson*, 20th Dec. 1881, 9 R. 370, accidental omission to print proof, remedied at once. See also *infra* note (c) to the fifth regulation.

(c) *Macquian v. Macdonald*, 17th May, 1871, 9 M. 743. Parties residing in the Hebrides.

finds the respondent entitled to three guineas of expenses.(d) Exceptions have been made to this regulation, and accidental mistakes and omissions(e) have been allowed to be rectified, even after the lapse of the eight days, where they were not serious and where they were brought before the Court before the cause had been actually retransmitted.(f)

**12. Powers of Court of Session.**—The appeal submits to the review of the Court of Session all the interlocutors pronounced in the cause ; and there is no difference in this respect between an appeal against an interlocutory judgment, and one against a final judgment.(g) No counter appeal is required, and the Court may alter any interlocutor, in any manner, at the instance of any party, so as to enable it to do complete justice in the cause. This provision does away with the necessity which existed formerly for an appellant or respondent pointing out in his advocacy, or counter advocacy, the special interlocutors complained of, and the special remedies desired.(h)

**13. Hearing, Proof, and Judgment.**—In deciding the cause the Court must apply the law applicable to the circumstances, whether it has been pleaded or not—a provision which has been introduced to prevent the necessity of having to add to or amend the record where the facts were sufficiently stated.(i) In their judgment, the Court must

(d) A. S., March, 1870, § 8.

(e) *Walker v. Reid*, 12th May, 1877, 4 R. 714—prints lodged on box-day in vacation, in place of within fourteen days ; *Young v. Brown*, 19th Feb. 1875, 2 R. 456—omission to print the note of appeal.

(f) *Park v. Weir*, 15th October, 1874, 12 S. L. R. 11, as explained in cases cited in preceding note.

(g) *Cross v. Bordes*, 22nd May, 1879, 6 R. 934.

(h) 31 & 32 Vict. c. 100, § 69.

(i) *Ibid.* § 72.

distinguish, in cases in which proof has been taken, how far they proceed upon matter of fact, and how far upon matter of law—their decision on the former not being liable to review by the House of Lords.(j) They must also dispose of the matter of expenses. A general finding of expenses to be due, includes those incurred both in the Court of Session and the Inferior Court.(k)

If there be objections to the competency of the appeal, the proper time for stating them is when the cause first appears on the rolls of the Inner House, in what is called the “Single Bills.”(l) If when the cause comes to be heard on the merits, it is not (in the opinion of the Court) ripe for judgment, they may order proof or additional proof to be taken in the appeal. This proof must be taken in the way in which proofs are taken in the Inner House.(m)

The Court has also power to amend the record at any time on such conditions as to expenses as they may think proper,(n) and in exercising this power they may allow new grounds of action or defence to be stated.(n)

**14. Respondent failing to appear.**—Should the respondent not appear at the hearing, it was till recently not clear what course the Statute of 1868 intended should be followed. Under the old forms, where an appellant found caution for the expenses in the Court of Session, there was probably never much hardship in insisting upon the respondent defending the judgment; and it not having been the practice of the Court of Session to hear causes *ex parte*, appeals were at first

(j) 6 Geo. IV. c. 120, § 40.

(m) 31 & 32 Vict. c. 100, § 72.

(k) Halbert v. Bogle, 28th May, 1857,  
19 D. 762.

(n) Gibson v. Smith, 29th Jan. 1870,  
8 M. 445. Rose v. Johnston, 2nd Feb.

(l) Ross v. Brims, 14th March, 1878,  
15 S. L. R. 438.

1878, 5 R. 600.

sustained simply on the ground of the respondent's absence,<sup>(o)</sup> and intimation was not even given before sustaining the appeal for this default.<sup>(p)</sup> But ultimately the more salutary rule has been adopted, that, if the respondent fail to appear, the Court will not alter the judgment of the Sheriff, unless the appellant shall satisfy them by argument that it is wrong.<sup>(q)</sup>

**15. Appellant withdrawing Appeal.**—Should the appellant withdraw from the appeal, any other party in the cause may insist in the appeal in the same manner as if he himself had brought the case to the Superior Court.<sup>(r)</sup>

If the appellant withdraws, he of course has expenses to pay. Where he withdraws, when the appeal appears in the "Single Bills," a fixed award of £3, 3s. of expenses is made against him.<sup>(s)</sup> If he does not withdraw till a later stage, he has to pay the respondent's expenses as they may be taxed.<sup>(t)</sup>

**16. Possession pending Appeal.**—Until the appeal comes on for hearing before the Court of Session, the Sheriff Court is to regulate all matters relating to interim possession. In doing this the Sheriff Court can act on the application of either party, and is directed to have regard to the manner in which the interests of the parties may be affected by the final decision. Any interim order on such matters is not subject to review until the cause comes to be heard; and then it will be for the Court of Session to make such regulations about interim possession as they find right.<sup>(u)</sup>

(o) *Stewart v. Stewart*, 16th May, 1871, 9 M. 740.

(p) *M'Donald v. Malcolm*, 18th Jan. 1870, 8 M. 419.

(q) *Alder v. Clark*, 8th July, 1880, 7 R. 1093; *Aitken v. Robertson*, 13th Nov. 1880, 8 R. 12.

(r) 31 & 32 Vict. c. 100, § 69.

(s) *Gentles v. Beattie*, 15th Oct. 1880, 8 R. 13.

(t) *Sligo v. Knox*, 2nd Nov. 1880, 8 R. 41.

(u) 31 & 32 Vict. c. 100, § 79.



## REMOVAL APPEALS.

**17. Removal under Act of 1877.**—The provisions for removing actions brought under the Sheriff-Court Act of 1877 have already been explained (*supra*, p. 406) in connection with actions of declarator, and need not be repeated. Difficulties may occur where a party has combined conclusions competent under that Act only, with others competent at common law; but as the Clerk cannot divide the process, he will have to transmit the whole, and leave the difficulties to be solved elsewhere. As has also been already pointed out (*supra*, p. 563), if an action under the Act of 1877 goes on to judgment in the Sheriff Court, there is no restriction on the right of appeal in respect of the value of the cause. In other respects, the right must be the same as in ordinary action. The Employers Liability Act of 1880 adopts the provision as to removal, but not that as to value in the case of an appeal (*supra*, p. 419).

**18. Appeal for Jury Trial.**—When more than £40 is claimed in any Sheriff-Court action, and a proof has been allowed, the pursuer or defender may appeal to the Court of Session with the view of having the case tried by jury.(v)

The claim must be in amount above £40.(w) If the claim be not simply pecuniary, and its value, therefore, does not appear on the face of the petition, the party intending to appeal must (before the proof is taken) petition the Sheriff for leave; and, after intimating the petition to the opposite party or his agent, must, if required by the Sheriff, give his solemn declaration that the claim is of the true value of £40

(v) 31 & 32 Vict. c. 100, § 73.

(w) It has been held that an action for half-a-crown a-week of aliment by a man sixty-six years of age is of more

value than £40, and is, therefore, appealable without leave; *Hamilton*, 20th March, 1877, 4 R. 688.

and upwards. If the Sheriff be satisfied in regard to this, leave to appeal shall be granted ;(x) and whether he grant or refuse the leave, there is no review of his decision on this point.(y)

An order for proof must have been pronounced. The proof may be in regard only to part of the cause, or it may be a proof "before answer,"(z) or it may be in the shape of a remit to a man of skill to report,(a) but the appeal will not be competent if the proof be one to lie *in retentis*, or be merely a diligence for the recovery of documents,(b) or if it be a proof limited altogether (c) to writ or oath.(d)

The appeal for trial by jury is by note of appeal under the Act of 1868.(e) It does not appear to have been intended to make the times for ordinary appeals applicable to this, and parties are allowed fifteen days—and no more—from the date of the first fixing of the proof, in which to engross the appeal.(f) If the Sheriff's leave is requisite, it must be obtained within this period, so as to allow of the appeal being engrossed before its expiry.(g) Unless parties agree to go on sooner with the proof, they are entitled, where this appeal is competent, to a delay of fifteen days between the granting and the time of commencing to take proof, for the purpose of considering whether they will have the case tried by jury

(x) 6 Geo. IV. c. 120, § 40 ; A. S. 11th July, 1828, § 5.

(y) *Rain v. Gibb*, 19th May, 1877, 4 R. 732.

(z) *Stewart v. Rutherford*, 19th July, 1862, 24 D. 1442.

(a) *Tulloch v. Mackintosh*, 10th Mar. 1838, 16 S. 983.

(b) These cases are expressly excepted by A. S. 11th July, 1828, *ut supra*.

(c) *Robertson v. Dudley*, 18th July,

1875, 2 R. 935.

(d) *Primrose v. McKenzie*, 18th Nov. 1859, 22 D. 1 ; *Shirra v. Robertson*, 7th June, 1873, 11 M. 660.

(e) 31 & 32 Vict. c. 100, § 78.

(f) *Kinnes v. Fleming*, 15th Jan. 1881, 8 R. 386. In Orkney and Shetland the period is thirty days.

(g) *Duff v. Stewart*, 20th Oct. 1881, 9 R. 17.

or not ;(*h*) but they are not entitled to this delay where the cause is not *ex facie* over the £40.(*i*)

The proceedings in the Court of Session begin in the same way as in an ordinary appeal, but the case may be remitted to a Lord Ordinary.(*j*) The Court are not bound to send the case to a jury, but may dispose of it as it seems best to them, because the whole case is brought before them for review.(*k*) The party appealing for jury trial can hardly say that he thinks proof unnecessary ; but he may apply to have the proof taken in any manner competent in the Court of Session.(*l*) The Court, however, will in general refuse his application to have the case otherwise tried than by jury ;(*m*) and if they think the case unsuitable for jury trial, may remit it for proof to the Sheriff Court,(*n*) though, as already explained, they are not bound to do so, and in a case where they think that course inexpedient, may direct the proof to be taken either before an Inner House judge, or a Lord Ordinary.(*o*) The respondent is not barred in any way from maintaining any of his pleas.

(*h*) A. S. 10th July, 1839, § 126. In Orkney and Shetland the time is thirty days ; *ante*, p. 151.

(*i*) *Ritchie v. Ritchie*, 22nd Oct. 1870, 9 M. 43.

(*j*) 31 & 32 Vict. c. 100, § 73. Should the case be tried by a jury on circuit, the Sheriff-Court agent may conduct the cause there. *Ibid* § 50.

(*k*) *Campbell v. Campbell*, 21st Nov. 1846, 9 D. 135. By the appeal the case is removed from the Sheriff Court, and it may be dealt with in the Court of Session in the same manner as if it had originated there ; *Ewing v. Cochran* (whole Court), 20th July, 1883, 20 S. L. R. 842.

(*l*) *Sands v. Meffan*, 20th Jan. 1829, 7 S. 290.

(*m*) *Dennistoun v. Rainey, Knox & Co.*, 16th May, 1871, 9 M. 739 ; *Macintosh v. Ross*, 7th Dec. 1875, 3 R. 232.

(*n*) *Chisholm v. Marshall*, 17th Jan. 1874, 1 R. 383.

(*o*) *Laidlaw v. Wilson*, 24th Nov. 1874, 2 R. 148. The proof here was taken before an Inner House judge ; Lord Ormisdale dissented, the course taken making appeal to the House of Lords competent on the facts. In *Ewing, supra*, note (*k*), the case was remitted to a Lord Ordinary to take the proof.

**19. Appeal on Contingency.**—When there are two actions, one in the Court of Session and one in the Sheriff Court, so connected with each other that had they both been in the inferior Court they would have been conjoined, the action in the inferior Court may be removed to the higher Court, and conjoined with, or conducted alongside of, the action there depending. The circumstances in which it is proper that actions should be conjoined have already been considered.<sup>(p)</sup> When a party desires to remove an action on this ground of “contingency” to the Court of Session, he must get from the Sheriff-Clerk a certified copy of the pleadings that have been lodged, and of the interlocutors pronounced in the cause. This copy he must lay before the Lord Ordinary, or before the Division before which the Court of Session process is depending. If, upon consideration of this, the Lord Ordinary or Court think that there is contingency between the processes, a warrant may be granted to enable the Sheriff-Clerk to transmit the inferior Court process to the superior Court.<sup>(q)</sup> The decision of the Lord Ordinary or of the Court is final, but if the motion be refused, it may be renewed by either party at a subsequent stage.<sup>(r)</sup>

<sup>(p)</sup> *Supra*, p. 262.

<sup>(r)</sup> 31 & 32 Vict. c. 100, § 75.

<sup>(q)</sup> 31 & 32 Vict. c. 100, § 74.

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### CHAPTER III. OF SUSPENSIONS AND REDUCTIONS.

| SUSPENSIONS.   | REDUCTIONS.  |
|--|--|
| 1. <i>When Suspension competent.</i><br>2. <i>Proceedings in Suspension.</i> | 3. <i>When Reduction competent.</i><br>4. <i>Proceedings in Reduction.</i> |

#### SUSPENSIONS.

**1. When Suspension competent.**—After extract, or after the lapse of six months without extract, review by presenting an appeal becomes incompetent; but in certain cases may still be obtained by presenting a note of suspension. If an appeal have been taken and disposed of, even though it may have been dismissed without a judgment on the merits, a second application for review, made by presenting a note of suspension, is incompetent.(a)

The £25 limit of value applies to suspension as well as to appeals, and under the same restrictions.(b)

Suspension is competent where the decree of the Sheriff Court contains any order for the payment of money—not being merely expenses(c)—or for the performance of any act on which execution is competent against the property or person of the debtor.(d) Interim decrees for payment of money may be suspended in the same way as final decrees; and although it

(a) *Watt v. Foyn*, 1st Nov. 1879, 7 R. 126; *Mackenzie v. North British Railway Co.*, 22nd Nov. 1879, 17 S. L. R. 129, and 7 R. 128.

(b) 16 & 17 Vict. c. 80, § 22, *supra*,

Chap. II. art. 1, p. 563.

(c) *Simpson v. Young*, 8th July, 1852, 14 D. 990.

(d) *Mackay's Practice in the Court of Session*, vol. ii. p. 432.

is expressly provided that no other kind of interim decree can be reviewed until the final judgment has been given,(e) the Court of Session have held that they were entitled, when they saw cause, to suspend execution of a decree *ad factum præstandum* till such time as the complainer could competently bring the merits before them.(f) The reasons for this decision apply equally to the case of an interim interdict being granted; for the consequences of ordering a person not to do a thing may be as injurious as an order obliging him to do something.(g)

Suspension is also the proper mode of review in actions where the extract is issued without giving time to appeal, and in those cases where the warrant issues at once. To the first class belong removings and ejections;(h) and to the second warrants pronounced in petitions for law-burrows;(i) and against an absconding debtor.(j)

Suspension is incompetent where the debtor has implemented the decree, even in those cases in which suspension is otherwise the appropriate mode of appeal. In this connection, implement is used in its ordinary sense, and not in the wider sense in which it is used in reference to reponing against decrees pronounced in absence. Where the debtor is in prison, the suspension is called a suspension and liberation; and the implement which precludes suspension occurs only where a debtor neglects to complain to the Court of Session till the

(e) 16 & 17 Vict. c. 80, § 24.

(f) *Wilson v. Bartholomew*, 7th July, 1860, 22 D. 1410.

(g) Where interdict *ad interim* is refused, the complainer can (at no great loss) practically obtain a review of the decision by abandoning the proceedings before the Sheriff Court and renewing them before the Court of Session.

(h) 6 Geo. IV. c. 120, § 44. 31 & 32 Vict. c. 100 (§§ 64 and 65) does not repeal this; *Fletcher v. Davidson*, 3rd Nov. 1874, 2 R. 71; *Ross v. Brims*, 14th March, 1878, 15 S. L. R. 438.

(i) See *supra*, p. 452.

(j) Cases cited *supra*, Part III. Chap. II. section XIX.

creditor has obtained everything the decree gives him on the merits of his case.(*k*)

**2. Proceedings in Suspension.**—The suspension is presented in the Bill Chamber of the Court of Session, and the suspender in the ordinary case is bound to find caution there to implement the decree, and for expenses, before he will be allowed to proceed.(*l*) The case is conducted under the forms of process in use in the Court of Session.(*m*) It is a serious defect in these forms that the Court is limited to the alternative of simply sustaining or reversing the Sheriff's decree and cannot amend it.(*n*)

#### REDUCTIONS.

**3. When Reduction competent.**—Where suspension is incompetent, and in other cases, should the complainer prefer it, there is the remedy of reduction.(*o*) Reduction is the appropriate remedy when a decree of absolvitor with expenses has been pronounced.(*p*) The £25 limit of value is still applicable.(*q*) There seems no limit as to time, but there should be no undue or unavoidable delay.

**4. Proceedings in Reduction.**—The pursuer of the action is not bound to find caution; and the bringing of the action

(*k*) *M'Dougall v. Galt*, 30th June, 1863, 1 M. 1012. The complainer was ordained in the Sheriff Court to remove and pay expenses. He did not pay, but he removed. Suspension was held incompetent.

(*l*) Juratory caution is sometimes received; *Logan v. Weir*, 16th July, 1870, 8 M. 1009.

(*m*) 1 & 2 Vict. c. 86; A. S., regulating proceedings in Bill Chamber,

24th Dec. 1838; 31 & 32 Vict. c. 100, § 90.

(*n*) *Lyon v. Irvine*, 13th Feb. 1874, 1 R. 513.

(*o*) *Sooular v. M'Laughlan*, 29th March, 1864, 2 M. 955; *M'Leod v. Collie*, 9th Nov. 1869, 42 S. Jur. 62.

(*p*) *Whyte v. Vallance*, 14th Feb. 1835, 13 S. 470.

(*q*) 16 & 17 Vict. c. 80, § 22, *supra*, Chap. II. art. 1, p. 563.

does not stay execution.(*r*) The conclusion, which is framed with the usual superfluity of technical terms, asks to have the Sheriff Court proceedings quashed. The action is conducted in all respects like any other action of reduction in the Court of Session.(*s*)

(*r*) *Holmes v. Tassie*, 19th June, 1828,  
6 S. 394.

(*s*) *Mackay's Practice*, vol. ii. p. 445.

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## CHAPTER IV.

## OF REVIEW OF SMALL-DEBT COURT DECISIONS.

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| 1. <i>What Review competent.</i><br>2. <i>Reviewing Tribunal.</i><br>3. <i>Mode of taking Appeal.</i> | 4. <i>Jurisdiction of Statutory Tribunal<br/>privative.</i> |
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**1. What Review competent.**—The right of review in the Small-Debt Court is of a limited kind. There is no review upon the merits, whether the decision be wrong in point of fact or in point of law.<sup>(a)</sup> The review is limited to complaints founded—(1) on the ground of corruption or malice and oppression on the part of the Sheriff; (2) on such deviations in point of form from the statutory enactments as the reviewing Court shall think either took place wilfully, or prevented substantial justice from having been done; and (3) on incompetency, including defect of jurisdiction of the Sheriff.<sup>(b)</sup>

**2. Reviewing Tribunal.**—The provisions of the Small-Debt Act as to the grounds on which review is competent are very much the same as those which the common law would have made had there simply been a provision that the judgment of the Sheriff Court should be final; but the Act goes farther, and provides a special reviewing tribunal. The person conceiving himself aggrieved must bring the case by appeal before

(a) 1 Vict. c. 41, § 30.

(b) *Ibid.* § 31. As to meaning of

"incompetency," see *Allison v. Balmain*, 25th Oct. 1882, 10 R. (J. C.) 12.

the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary.(c)

**3. Mode of taking Appeal.**—The appeal may be taken in open Court at pronouncing decree, or within ten days thereafter. The appeal is in writing, lodged in the hands of the Clerk of Court. Within the same time a copy must be served on the opposite party, or at his dwelling-place, or on his agent. This service obliges the respondent to appear at the first Circuit Court(d) or High Court (as the case may be), held at least fifteen days after such service. The appellant, on entering the appeal, must lodge a bond, signed by a sufficient cautioner, that he will abide by the judgment of the Justiciary Court, and pay such costs as it shall award. The Sheriff-Clerk is answerable for the sufficiency of this cautioner. If documents have been used in evidence in the Small-Debt Court, which the appellant desires to use in the Court of Appeal, he must ask the Sheriff to initial them; and, in the same way, he must ask the Sheriff to write on the summons the name of any witness examined in the cause to whose evidence he intends to refer. Unless the appellant consign the sum and expenses decerned for, there is no stay of execution.(e)

The Circuit Court may send ("certify") the case to the High Court of Justiciary;(f) and either Court may remit the case to the Sheriff, with instructions,(g) or to the Court of Session, for disposal.(z)

(c) 1 Vict. c. 41, § 31.

(d) The additional Circuit Courts recently instituted have the same jurisdiction as the others, the only exception being the Glasgow December Circuit, which is expressly limited to criminal business; *Sinclair v. Hollis*, 9th Nov. 1881, 9 R. J. C. 1; *Davidson v. Gray*,

6th Jan. 1844, 2 Broun, 9.

(e) 1 Vict. c. 41, § 31.

(f) *Ibid.*; 20 Geo. II. c. 43, §§ 34, 35, and 36.

(g) *Glass v. Laughlin*, 10th Nov. 1876, 4 R. 108.

(z) *Burrell v. Foster*, 2 Nov. 1868, 1 Coup. 108.

**4. Jurisdiction of Statutory Tribunal privative.**—The jurisdiction thus conferred on the Justiciary Court is privative, and any person aggrieved by the decree of the Sheriff in the Small-Debt Court can appeal only to this Court. It has frequently been decided that the Court of Session has no jurisdiction in such cases,<sup>(h)</sup> unless, indeed, the proceedings have been “fundamentally null and illegal.”<sup>(i)</sup> A distinction has also been taken between the case of a complaint against a decree and a complaint against something done subsequently to the decree; and it has been held that jurisdiction to deal with the latter case has not been restricted to the statutory tribunal. Thus, where a party who admitted the Sheriff’s decree to be correct, but alleged that the Sheriff-Clerk had altered the extract after issuing it, and had, without any authority, inserted a larger sum, the Court of Session held that they had power to reduce the vitiated extract of the decree.<sup>(j)</sup> On the same principle, it was held that a warrant which followed the decree, but on too short a charge, could be reduced.<sup>(k)</sup> And where the proceedings were all regular except the poiding, which it was said was done recklessly, an action of reduction was thought to be so clearly com-

(h) *Graham v. Mackay*, 13th March, 1848, 6 Bell’s App. Ca. 214; *Lowden’s Trustees v. Patullo*, 17th Dec. 1846, 9 D. 281; *Miller v. Henderson*, 2nd Feb. 1850, 12 D. 656; *Lennon v. Tully*, 12th July, 1879, 6 R. 1253.

(i) *Manson v. Smith*, 8th Feb. 1871, 9 M. 492. The illegality here consisted in the Clerk of Court having acted in a suit in which he was interested.

(j) *Murchie v. Fairbairn*, 22nd May,

1863, 1 M. 800 (Lord Deas dissented). See also *Scott v. Letham*, *supra*, p. 506, note (d), where effect was given to the distinction between “an appeal against a decree” and “a question as to the regularity of the process of execution,”—the jurisdiction of the Court of Session being sustained in the latter case.

(k) *Shiell v. Mossman*, 7th Nov. 1871 10 M. 58.

petent that no objection to its competency was raised.<sup>(1)</sup> The exceptions are going far towards eating up the rule, and towards substituting an expensive form of review for the inexpensive one originally contemplated.

(1) *Le Conte v. Douglas*, 1st Dec. 1880, 8 R. 175.

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## CHAPTER V. OF SPECIAL PROVISIONS FOR REVIEW.

### 1. *Debts-Recovery Court.*                      | 2. *Other Special Provisions for Review.*

**1. Debts-Recovery Court.**—In the Debts-Recovery Court special provisions are made for regulating appeals. It affords the only instance in which it is necessary to appeal from Sheriff-Substitute to principal Sheriff before going to the Court of Session.(a) Where the cause exceeds the value of £25 sterling,(b) either party may appeal from the principal Sheriff's judgment to either of the Divisions of the Court of Session. The appeal must be taken within eight days, or in cases from Orkney and Shetland, within sixteen days, and is taken by engrossing on the interlocutor sheet a note of appeal signed by the appellant or his agent. The Sheriff-Clerk must forthwith transmit the process to one of the principal clerks of the Division. After this has been done, the appellant must (within ten days if the Court is sitting, or on the third day of its next session) enrol the cause by written note. Should he fail to enrol, the cause is retransmitted to the Sheriff Court.(c) Should he enrol, he must intimate the enrolment

(a) 30 & 31 Vict. c. 96, §§ 11, 13.

(b) If the cause is under £25, there seems to be an appeal to the Court of Justiciary on the grounds competent in the Small-Debt Court; *Stewart v.*

*M'Gregor*, 23rd Sept. 1868, 1 Couper J. C. 92. See *supra*, p. 562, note (a).

(c) *Baird v. Field*, 4th June, 1869, 7 M. 862.

by letter to the respondent or his agent; and on the cause being called, the Court give such orders as to printing papers as they think fit; and then the case is sent to the Summary Debate Roll. When the case is heard, the Court of Session has power to order the evidence to be taken anew, or additional evidence to be taken by the Sheriff, with such directions as shall seem right. If they do not think this necessary, they may affirm, or alter, or pronounce such other judgment as shall seem just. They may either remit to the Sheriff to decern anew—so that the decree may be extracted from the Sheriff Court—or pronounce a decree extractable in the Supreme Court.(d)

**2. Other Special Provisions for Review.**—The modes of appealing against decisions pronounced in applications for the Service of Heirs,(e) and under the Ecclesiastical Buildings and Glebes Act,(f) and under the Entail Amendment Act,(g) have been noticed in connection with the subjects themselves.

(d) 30 & 31 Vict. c. 96, §§ 12, 13, and 14. Suspension, though not a competent mode of appealing against a debt-recovery decree, may be used if something has happened since the date of the decree making its enforcement

illegal; *Samuel v. Mackenzie*, 29th Nov. 1876, 4 R. 187.

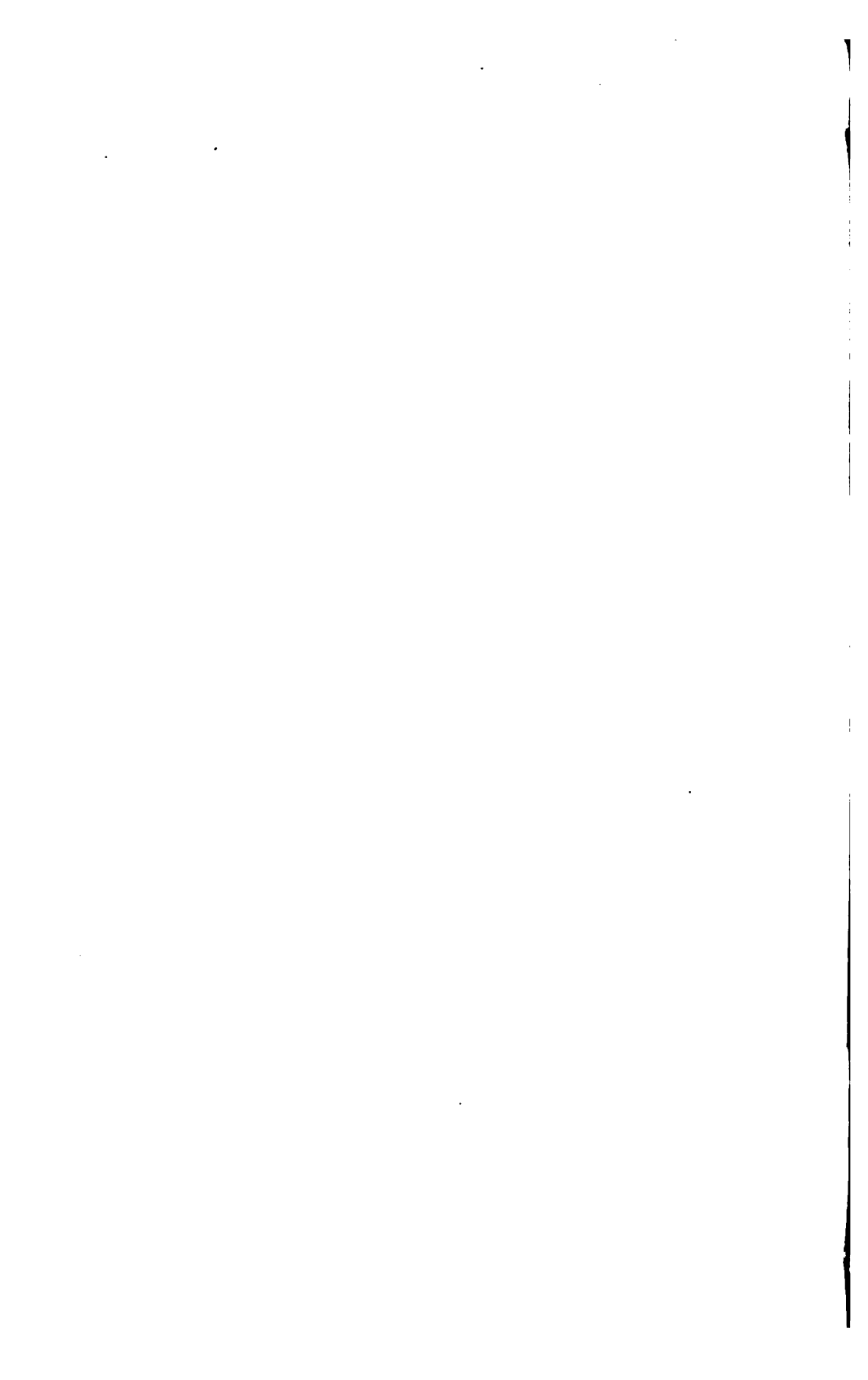
(e) *Supra*, pp. 537 and 538, art. 7 and 9.

(f) *Supra*, p. 413, art. 4.

(g) *Supra*, p. 424, art. 6.

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## APPENDIX.





# APPENDIX.

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## ACTS OF PARLIAMENT AND SEDERUNT.

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### PART I.

#### ORDINARY COURT—GENERAL ACTS.

- 11 *Geo. IV. & 1 Will. IV. c. 69.*—An Act for uniting the benefits of Jury Trial in Civil Causes with the ordinary jurisdiction of the Court of Session, and for making certain other alterations and reductions in the Judicial Establishments of Scotland.—23rd July, 1830.

21. [*Transference of Admiralty Jurisdiction.*].—And whereas all maritime causes may now be brought by review before the Court of Session, and many causes formerly heard and determined by the High Court of Admiralty are now remitted to the Jury Court : And whereas the Court of Justiciary holds a cumulative jurisdiction with the High Court of Admiralty as to all crimes competent to be tried by the High Court of Admiralty : And whereas it has become unnecessary and inexpedient to maintain any separate court for maritime or Admiralty causes ; be it therefore enacted that the High Court of Admiralty be abolished, and that hereafter the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act ; and all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills : Provided always that all such causes, not exceeding the value of twenty-five pounds

sterling, shall be instituted and carried on in the first instance before an inferior court, in the manner directed and with the exceptions specified in an Act of the Parliament of *Scotland*, passed in the year sixteen hundred and seventy-two, intituled *An Act concerning the regulation of the judicatories*. (1672, c. 40.)

22. [*Sheriffs to have jurisdiction in maritime causes.*—And be it enacted that the Sheriffs of *Scotland* and their Substitutes shall, within their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring-grounds in or adjoining such sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of *Scotland*, of the same nature as that heretofore held and exercised by the High Court of Admiralty.

23. [*Maritime causes to be tried in same manner as other causes.*—And be it enacted that the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty, and all regulations relative thereto, may be enforced in the foresaid courts respectively; and maritime causes may be heard and determined by the Sheriff according to the same modes and rules which are applicable in the Sheriff Court to causes not maritime, including the mode prescribed in an Act passed in the tenth year of the reign of his late Majesty King *George the Fourth*, intituled *An Act for the more effectual recovery of small debts, and for diminishing the expenses of litigation in causes of small amount in the Sheriff Courts in Scotland* (10th Geo. IV. c. 55); and the sentences, interlocutors, and decrees pronounced by Sheriffs in maritime causes shall be subject to review by the Courts of Session and Justiciary respectively in the same way and manner in which sentences, interlocutors, and decrees of Sheriffs in similar causes not maritime are subject to review at present, and not otherwise: Provided always that it shall not be competent to the Sheriff to try any crime committed on the seas of a nature which it would not be competent for that judge to try if the crime had been committed on land.

24. [*Provision when counties are separated by water.*—And be it enacted that where counties are separated from each other by a river, or by a firth or estuary, the Sheriffs of the counties adjoining to the sides thereof shall have a cumulative jurisdiction over the whole intervening space so occupied by water: Provided always that the pursuer of all civil cases shall, where such cumulative jurisdiction applies, bring the cause before the Sheriff of that county within which the defender may reside; and it is provided that where there are several defenders in the same cause, residing in different counties, the same rules shall apply in regard to the citation of the whole of such defenders before the same Sheriff Court which are observed in similar circumstances with respect to causes not maritime; and it is provided further that Sheriffs shall respectively have power to remit such causes from their own court to that of another Sheriff *ob contingentiam*, or for other sufficient cause.

27. [*Sheriff-Clerks to act as clerks to Sheriffs in maritime causes.*]

32. [*Actions of aliment.*].—And it is further enacted that actions of aliment may be instituted, heard, and determined in any Sheriff Court of Scotland.

33. [*Consistorial actions to be instituted in the Court of Session.*].—And be it enacted that all actions of declarator of marriage, and of nullity of marriage, and all actions of declarator of legitimacy and of bastardy, and all actions of divorce, and all actions of separation *à mens et thoro*, shall be competent to be brought and insisted on only before the Court of Session.\*

1 & 2 Vict. c. 114.—An ACT to amend the Law of Scotland in matters relating to Personal Diligence, Arrestments, and Poindings.—16th August, 1838.

WHEREAS it is expedient to improve the form and to diminish the expense of the diligence of the law in Scotland against the persons of debtors, and to amend the law as to the diligence of arrestment and poinding: Be it therefore enacted, &c.

[*Extracts of Court of Session, Teind Court, and Court of Justiciary decrees to contain warrant to arrest, charge, and poind.*]

2. [*Competent to arrest.*]

3. [*Competent to charge. Officer's execution.*]

4. [*Competent to poind.*]

5. [*Execution to be registered; and to have the effect of denunciation and to accumulate interest.*]

6. [*Extract and execution with certificate of registration to be presented in the Bill Chamber for warrant to imprison.*]

7. [*Execution at the instance of a person acquiring right to extract.*]

8. [*Letters of horning may be issued as formerly, but no expenses exigible. Extracts in terms of this Act may be obtained where extracts issued prior to its commencement.*]

9. [*Extracts of Sheriff's decrees, &c., to contain warrant to arrest, charge, poind, and open shut and lockfast places.*].—And be it enacted, That from and after the said thirty-first day of December, where an extract shall be issued of any decree or act pronounced or to be pronounced by any Sheriff, or of a decree proceeding upon any deed, decree-arbitral, bond, protest of a bill,

\* The Act 13 & 14 Vict. c. 36 (to facilitate procedure in Court of Session) enacted and declared (§ 16) that all the provisions of the above Act "applicable to actions of declarator of marriage, and of nullity of marriage, and to actions of declarator of legitimacy and

of bastardy, and to actions of divorce, and to actions of separation *à mens et thoro*, are and shall be applicable to actions of adherence, and all other consistorial actions though not specially mentioned in the said recited Act."

promissory-note, or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the Sheriff Court books, the extractor shall, in terms of the schedule (Number 6) hereunto annexed (or as near thereto as circumstances will permit), insert therein a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment and to arrest and poind according to the present practice, and, if need be for the purpose of poinding, to open shut and lockfast places ; which extract shall be subscribed and prepared, in other respects as extracts are at present subscribed and prepared, and for which extracts no higher fees shall be exigible than those which are payable as by law established ; and where an extract has been issued from the books of the Sheriff before the commencement of this Act, it shall be competent for the person in whose favour such extract has been issued, or the person having right thereto, to obtain an extract in terms of this Act, or a warrant subjoined to the former extract in terms of the said schedule (Number 6), and to prosecute diligence thereon agreeably to the provisions hereof.

10. [*Execution to be registered, and to accumulate interest.*].—And be it enacted, That it shall be lawful by virtue of such extract to charge the debtor or obligant therein mentioned to pay the sums of money or to perform the obligation therein specified within the days of charge, under pain of poinding and imprisonment, and the officer executing the same shall return an execution in terms of the said schedule (Number 2), or as near to the form thereof as circumstances will permit ; and it shall be competent at any time within year and day after a charge has expired to present the extract and execution of charge to the clerk of the Sheriff Court from which the extract has been issued, who shall thereupon record the execution in the register of hornings kept by him, and state therein the name and designation of the person by whom the extract and execution were presented and the date of presentation ; which registration shall have the same effect as if the debtor or obligant had been denounced rebel in virtue of letters of horning, and the said letters with the executions of charge and denunciation had been recorded according to the forms now in use, and shall have the effect to accumulate the debt and interest into a capital sum whereon interest shall thereafter become due.

11. [*Extract and execution with certificate of registration to be presented in Sheriff Court for warrant to imprison.*].—And be it enacted, That on the execution being so recorded the Sheriff-Clerk shall write upon the extract and upon the execution (if it be written on paper apart) a certificate of the registration thereof, which he shall date and subscribe, in terms of the schedule (Number 7) hereunto annexed (or as near thereto as circumstances will permit) ; and if warrant to imprison be desired, the creditor or a procurator of court shall endorse and subscribe on the said extract a minute in the terms of the schedule (Number 8) hereunto annexed (or as near to that form as circumstances will permit) ; and the said clerk shall, if there be no lawful

cause to the contrary, write on the extract this deliverance, "*Fiat ut petitur*," and shall date and subscribe the same; and it shall be lawful by virtue of the said extract and deliverance to search for, take, apprehend, imprison, and, if necessary for that purpose, to open shut and lockfast places as aforesaid; and magistrates and keepers of prisons are hereby authorised and required to receive into and detain in prison the person of the debtor or obligant till liberated in due course of law, in like manner as if letters of caption had been issued under the signet.

12. [*Execution at the instance of a person acquiring right to the extract.*—And be it enacted, That where any person has acquired right to an extract of a decree or act of the Sheriff he may present to the Sheriff-Clerk the extract, with the execution of charge (if a charge shall have been given), and certificate of registration (if the same shall have been registered), and a minute endorsed on the extract in the form of the schedule (Number 9) hereunto annexed (or as near thereto as circumstances will permit), subscribed by him or a procurator of court, with the assignation, confirmation, or other legal evidence of the acquired right, praying for authority (as the case may be) to arrest, charge, poind the effects of, or (as the case may be) to imprison the said debtor or obligant, and open shut and lockfast places; and the clerk shall, if there be no lawful cause to the contrary, write on the extract this deliverance, "*Fiat ut petitur*," and he shall date and subscribe the same, and endorse the same date on the documents produced, and subscribe with his initials the date so endorsed; and the extract, with such deliverance, shall be a warrant to arrest, charge, poind, and open shut and lockfast places, or (as the case may be) to search for, take, apprehend, and imprison as aforesaid, at the instance of such person.

13. [*Warrant of concurrence to charge, arrest, and poind.*—And be it enacted, That where a debtor or obligant is or his moveables are within the territory of any other Sheriff than the Sheriff from whose books such extract shall be lawfully issued, it shall be competent to present the extract in the Bill Chamber of the Court of Session, or in the court of the Sheriff within whose jurisdiction the debtor or obligant is, or his moveables are, with a subscribed minute endorsed thereon in terms of the schedule (Number 10) hereunto annexed (or as near thereto as circumstances will permit), praying for the authority and concurrence of the Lords of Council and Session, or of the said Sheriff (as the case may be), to arrest, charge, and poind the moveables of the said debtor or obligant, and to open shut and lockfast places, all in terms of the warrant in the said extract; and if there be no lawful cause to the contrary, the clerk in the Bill Chamber, or the Sheriff-Clerk (as the case may be) shall grant authority accordingly by writing this deliverance, "*Fiat ut petitur*," and dating and subscribing the same; and it shall thereupon be lawful to arrest, charge, poind, and open shut and lockfast places, in the same manner as if the said extract had been originally issued from the books of the Court of Session or concurring Sheriff.

14. [*Warrant by concurring Sheriff-Clerk to imprison.*—And be it enacted,

That where the debtor or obligant shall have been charged on a warrant of concurrence, and the execution recorded in the books of the concurring court, the extract and execution, with the certificate of registration, and a minute in terms of the said schedule (Number 4) hereunto annexed (or as near thereto as circumstances will permit), endorsed thereon; may be presented either in the Bill Chamber subscribed by a writer to the signet, or in the court of the concurring Sheriff subscribed by a procurator of court, praying for authority to imprison as aforesaid; and if there be no lawful cause to the contrary, the Bill Chamber clerk or Sheriff-Clerk (as the case may be) shall grant authority accordingly by writing thereon this deliverance, "*Fiat ut petitur*," dating and subscribing the same; and it shall thereupon be lawful to open shut and lockfast places, search for, take, apprehend, and imprison, in manner hereinbefore provided.

15. [*Concurrence to warrant of imprisonment granted in another Sheriff Court.*—And be it enacted, That where a warrant to imprison has been granted by any Sheriff in manner hereinbefore provided, and where the debtor or obligant is within the territory of another Sheriff, such warrant may be presented, along with the extract, execution of charge, and certificate of registration, either in the Bill Chamber or in such other Sheriff Court, and a minute in terms or to the effect of the said schedule (Number 10) praying for the authority and concurrence of the Lords of Council and Session or of the said Sheriff Court for executing the said warrant; and if there be no lawful cause to the contrary, the clerk in the Bill Chamber or the Sheriff-Clerk (as the case may be) shall grant authority accordingly by writing this deliverance, "*Fiat ut petitur*," and dating and subscribing the same; and it shall thereupon be lawful to open shut and lockfast places, search for, take, apprehend, and imprison, in the same manner as if the said warrant had been originally granted by the Court of Session or the concurring Sheriff.

16. [*Warrant to arrest may be introduced into summonses before the Court of Session.*]

17. [*Arrestment may be executed before executing the summons, but the summons must be executed and called within a limited period.*—And be it enacted, That by virtue of such warrant of arrestment, and also by virtue of letters of arrestment raised upon any libelled summons according to the present practice, it shall be competent before executing the warrant of citation to arrest the moveables, debts, and money belonging or owing to the defender until caution be found as aforesaid; and such arrestment shall be effectual, provided the warrant of citation shall be executed against the defender within twenty days after the date of the execution of the arrestment, and the summons called in court within twenty days after the diet of compareance, or where the expiry of the said period of twenty days after the diet of compareance falls within the vacation, or previous to the first calling day in the session next ensuing, provided the summons be called on the first calling day next thereafter; and if the warrant of citation shall not be executed,

and the summons called in manner above directed, the arrestment shall be null, without prejudice to the validity of any subsequent arrestment duly executed in virtue of the said warrant.\*

18. [*Arrestments against persons furth of the Kingdom to be executed at the Record Office.*—And be it enacted, That from and after the said thirty-first day of December it shall not be competent to execute any arrestment as in the hands of a person furth of Scotland by service at the market-cross of Edinburgh, and pier and shore of Leith, but such arrestment shall be executed by delivery of a schedule of arrestment at the Record Office of Citations in the Court of Session, which delivery shall be made and the schedule registered and published in the same manner as charges are directed to be registered and published by an Act passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled, *An Act for the better regulating of the Forms of Process in the Courts of Law in Scotland.*

19. [*Sheriff's precepts of arrestment may be executed within jurisdiction of*

\* As to the arrestment of wages, see 1 Vict. c. 41, § 7; 8 & 9 Vict. c. 39, printed *infra*, Part III. See above, 33 & 34 Vict. c. 63, which is in the following terms:—

Whereas great evils have arisen through the arrestment of wages of labourers, manufacturers, artificers, and other workpeople, and also by the provisions relating to such arrestment in the Act first of Victoria, chapter forty-one, and it is desirable to remedy these evils:

Be it hereby enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

1. [*Wages of artificers not to be liable to arrestment for debts contracted after 1st Jan. 1871.*—That from and after the first day of January, One thousand eight hundred and seventy-one, the wages of all labourers, farm-servants, manufacturers, artificers, and workpeople shall cease to be liable to arrestment for debts contracted subsequent to the passing of this Act, save as hereinafter excepted.

2. [*Limitation of liability of wages to arrestment.*—If the amount of wages earned exceeds twenty shillings per week, any surplus above that amount shall still be liable to arrestment as before the passing of this Act, but the

expense or cost of any such arrestment shall not be chargeable against the debtor unless in virtue of such arrestment the arresting creditor shall recover a sum larger than the amount of such expense or cost.

3. [*As to debts incurred before passing of Act.*—No arrestment of wages shall hereafter attach more than the amount of any surplus above twenty shillings per week, unless it shall be stated on the face of the arrestment or endorsed thereon that the debt in respect of which it is used was incurred prior to the passing of this Act; and such statement may be made by a memorandum on the arrestment subscribed by the officer executing the same.

4. [*Act not to affect decrees for alimentary allowances, or for rates and taxes.*]—This Act shall in no way affect arrestments in virtue of decrees for alimentary allowances or payments, or for rates and taxes imposed by law; but every arrestment used after the first day of January, One thousand eight hundred and seventy-one, for such alimentary allowances or payments, or for rates and taxes imposed by law, shall set forth the nature of the debt for which it has been used, otherwise the same shall not be effectual.

5. [*Short title.*—This Act may be cited as "The Wages Arrestment Limitation (Scotland) Act" [1870].

*another Sheriff.*—And be it enacted, That from and after the said thirty-first day of *December* a warrant or precept of arrestment granted by any Sheriff in *Scotland*, whether contained in a libelled summons or proceeding upon a depending action or liquid document of debt, may lawfully be executed within the territory of any other Sheriff, the same being first endorsed by the Sheriff-Clerk of such sheriffdom, who is hereby required to make and date such endorsement.

20. [*Lord Ordinary in the Outer House may recall or restrict arrestments, subject to review.*]

21. [*Sheriff may recall or restrict arrestments, subject to review.*]—And be it enacted, That from and after the said thirty-first day of *December* it shall be competent for any Sheriff from whose books a warrant of arrestment has been issued, on the petition of the debtor or defender duly intimated to the creditor or pursuer, to recall or to restrict such arrestment, on caution or without caution, as to the Sheriff shall appear just; provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session.

22. [*Arrestments to prescribe in three years.*]—And be it enacted, That an Act of Parliament of *Scotland*, passed in the year One thousand six hundred and sixty-nine, concerning Prescriptions, shall be and is hereby repealed in so far as regards the period of prescription of arrestments; and all arrestments shall hereafter prescribe in three years instead of five; and arrestments which shall be used upon a future or contingent debt shall prescribe in three years from the time when the debt shall become due and the contingency be purified; but saving and reserving from the operation hereof all arrestments already used where the ground of arrestment is not an action in dependence at the date of passing this Act.

23. [*Comparing creditors to be conjoined, and pointed effects to be valued.*]—And be it enacted, That from and after the said thirty-first day of *December*, where an officer of the law shall proceed to point moveable effects, he shall, if required before the pointing is completed, conjoin in the pointing any creditor of the debtor who shall exhibit and deliver to him a warrant to point; and on the effects being pointed the officer shall cause them to be valued by two valutors, and one valuation by them shall be sufficient.

24. [*Effects to be left with, and schedule given to the possessor.*]—And be it enacted, That the officer shall leave the pointed effects with the person in whose possession they were when pointed; and he shall deliver to the possessor a schedule specifying the pointed effects, and at whose instance they were pointed, and the value thereof.

25. [*Officer to report pointing within eight days.*]—And be it enacted, That the officer shall, within eight days after the day on which the pointing was executed (unless cause shall be shown why the same could not be done within the period of eight days), report the execution thereof to the Sheriff,



in which execution he shall specify the diligence under which the pointing is executed, the amount of the debt, the names and designations of the debtor and of the creditor at whose instance the effects were pointed, the effects pointed, the value thereof, the names and designations of the valutors, the person in whose hands they were left, and the delivery of the schedule as aforesaid; which execution shall be subscribed by him and by the two valutors, who shall also be witnesses to the pointing, without the necessity of other witnesses.

26. [*Sale to be advertised, and notice to the debtor.*].—And be it enacted, That on the execution being reported, the Sheriff shall, if necessary, give orders for the security of the moveables, and if they be of a perishable nature, for the immediate disposal thereof, under such precautions as to him shall seem fit; and if not so disposed of, and if no lawful cause be shown to the contrary, he shall, if required, grant warrant to sell them by public roup at such time and at such place, with such public notice of the sale as may appear to the Sheriff most expedient for all concerned, and at the sight of a judge of the roup to be named by the Sheriff; provided that the sale shall not take place sooner than eight days, nor at a longer period than twenty days, after the date of the publication of the said notice of sale; and the Sheriff shall order a copy of the warrant of sale to be served on the debtor, and on the possessor of the pointed effects, if he be a different person from the debtor, at least six days before the date of the sale, excepting in the case of perishable effects.

27. [*Effects to be sold or delivered to pointing creditors.*].—And be it enacted, That the pointed moveables shall be offered for sale as ordered at upset prices not less than the appraised values thereof; but if no offerer appear, the effects, or such parts thereof as, according to their appraised value, may satisfy the debt, interest, and expenses due to the pointing creditor and conjoined creditor, shall be delivered by the judge of the roup to the said pointing creditor and conjoined creditor, or to his or their authorised agent, subject to the claims of other creditors, to be ranked as by law competent.

28. [*Report and price to be lodged.*].—And be it enacted, That on the moveables being sold or delivered as aforesaid, the judge of the roup shall, within eight days after the date of the sale, make a report to the Sheriff of the said sale or delivery; and if the effects shall have been sold, he shall also, within the said space of eight days, lodge with the Sheriff-Clerk the roup rolls or certified copies thereof, and an account of the sum arising from and of the expenses of the sale, which sum the Sheriff may, if he shall see cause, order to be lodged in the hands of the Sheriff-Clerk; and the said sum, after the deduction of lawful charges, shall, if no cause be shown to the contrary, be ordered by the Sheriff to be paid to the pointing creditor and conjoined creditor (provided the amount does not exceed the amount of the debt, interest, and expenses), but subject to the claims of other creditors, to be ranked as by law competent; and the report and relative documents,

when lodged, shall be patent to all concerned on payment of a fee of one shilling only.

29. [*Creditors entitled to purchase.*—And be it enacted, That where any effects are exposed to sale as aforesaid, it shall be lawful for the poulder or any other creditor to purchase the same.

30. [*Unlawful intruder liable to imprisonment or double the appraised value.*—And be it enacted, That if any person shall unlawfully intrude with or carry off the pouldered effects, he shall be liable, on summary complaint to the Sheriff of the county where the effects were pouldered, or where he is domiciled, to be imprisoned until he restore the effects or pay double the appraised value.

31. [*Act not to affect landlord's hypothec.*—And be it enacted, That nothing herein contained shall affect the landlord's hypothec for rents, or any hypothec known in law.

32. [*Citations, &c.—One witness.*—And be it enacted, That extracts, citations, deliverances, schedules, and executions may be either printed or in writing, or partly both, and that, excepting in the case of poudings, more than one witness shall not be required for service or execution thereof.\*

33. [*Compensation.*]

34. [*Compensation, how to be paid.*]

35. [*Diligence under this Act.*—Provided always, and be it enacted, That diligence executed under the provisions of this Act shall have the same effect as if such diligence had been executed by virtue of letters of horning or letters of caption, or if arrestments and poudings had been executed under the forms heretofore in use.

36. [*Act may be repealed, &c.*]

\* Amended by the following Act :—  
9 & 10 Vict. c. 67.—An Act to remove doubts concerning Citations and Services, and execution of Diligence in Scotland.—26th August, 1846.

WHEREAS an Act was passed in the second year of the reign of Her Majesty, intituled, *An Act to amend the Law of Scotland in matters relating to personal diligence, arrestments, and poudings* (1 & 2 Vict. c. 114), whereby it was enacted that extracts, citations, deliverances, schedules, and executions may be either printed or in writing, or partly both, and that, excepting in the case of poudings, more than one witness shall not be required for service or execution thereof: And whereas doubts have been entertained regarding the interpretation of the provisions above recited; and it is expedient to

remove such doubts: Be it therefore declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

[*Recited enactment to apply to all citations, services, &c.*—That the enactment herein-before recited does and shall apply to all citations on all summonses, and to all cases whatsoever of services and execution, and that more than one witness is not and shall not be required for service or execution in any case, excepting only in cases of pouding, as aforesaid.

2. [*Act may be amended, &c.*—And be it enacted, That this Act may be amended or repealed by any Act to be passed in the present session of Parliament.

## SCHEDULES referred to in the foregoing Act.

No. 1.—*Warrant to be subjoined to Extracts in the Court of Session, &c.*

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No. 2.—*Execution of Charge.*

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No. 3.—*Certificate of Registration of Execution of Charge.*

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No. 4.—*Minute in Bill Chamber for Warrant to imprison.*

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No. 5.—*Minute by Assignee, &c.*

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No. 6.—*Warrant to be subjoined to Sheriff Court Extracts.*

And I the said Sheriff grant warrant to messengers-at-arms and officers of court to charge the said *A.* personally, or at his dwelling-place [*state what the party is decerned to do; if to pay money, specify the sum, interest, and expenses; or if to fulfil an obligation, state the nature of it, as in the decree or other document*], and that to the said *B.* [*name of the person in whose favour the decree is pronounced*], within [*insert the appropriate days*] next after he is charged to that effect, under the pain of poinding and imprisonment, [*if the sum or document or any part be payable at a future time, add here, "the terms of payment being first come and bygone;"*] and also grant warrant in satisfaction of the said sum, interest, and expenses, to arrest the said *A.*'s readiest goods, debts, and sums of money; and if the said *A.* fail to obey the said charge, then to apprise, poind, and distrain all the said *A.*'s readiest goods, gear, and other effects; and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places, in form as effeirs. Extracted, &c.

[*Extractor's signature.*]

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No. 7.—*Certificate of Registration of execution of charge in Sheriff Court.*

Presented by *A. B.* [*name and designation*], and registered in the Particular Register of Hornings for the shire of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_

[*Keeper or Clerk's signature.*]

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No. 8.—*Minute in Sheriff Court for warrant to imprison.*

[Place and date.]

The charge being expired and registered as per execution and certificate produced, warrant is craved to search for, take, and apprehend the person of the said *A.* [*name of debtor or obligant*], and being so apprehended to imprison him within a Tolbooth or other warding place, therein to remain until he fulfil the said charge, and, if necessary for that purpose, to open shut and lockfast places; and warrant also to magistrates and keepers of prisons to receive and detain the said *A.* accordingly.

(Signed) *A. B.*

[The Clerk will subjoin]

Fiat ut petitur.

[Dated and signed by the Clerk.]

No. 9.—*Minute in Sheriff Court by Assignee, &c.*

[Place and Date.]

Warrant is craved [*state what is prayed for*] at the instance of [*specify name and designation of the applicant*], as [*assignee or otherwise, as the case may be*] of [*specify name and designation of the person at whose instance the extract was issued and in whose right the applicant is*], produced herewith [*say assignation or confirmation, or other legal evidences of the acquired right, as the case may be*]. Dated the                      day of                      [and if for imprisonment, execution of expired charge and certificate of resignation shall be produced, and warrant craved as in No. 8].

(Signed) *A. B.*

[The Clerk will subjoin]

Fiat ut petitur.

[Dated and signed by the Clerk.]

No. 10.—*Minute for warrant of concurrence.*

[Place and Date.]

Warrant of concurrence by the Lords of Council and Session is craved at the instance of [*specify name and designation of applicant*] for executing the within warrant against the within-designed [*specify name of debtor or obligant*].

*A. B.*

[*If the application is to a Sheriff, leave out "Lords of Council and Session," and say Sheriff of (inserting the shire.)*]

[The Clerk of the Bills or the Sheriff-Clerk, as the case may be, will subjoin]

Fiat ut petitur.

[Dated and signed by the clerk of the Bills or Sheriff-Clerk, as the case may be.]

1 & 2 Vict. c. 119.—An ACT to regulate the Constitution, Jurisdiction, and Forms of Process of Sheriff Courts in Scotland.—16th August, 1838.

WHEREAS the office of Sheriff and the Sheriff Courts in Scotland have been found to be of great utility, by affording in all ordinary cases a cheap and speedy administration of justice : And whereas it is expedient to regulate the constitution and enlarge the jurisdiction of Sheriff Courts, and to amend the forms of proceedings therein : Be it therefore enacted—

[*So much of the Act of 20 Geo. II. as requires residence of Sheriffs in their counties repealed.*]

2. [*Sheriff-Depute to hold courts in his sheriffdom, and to attend the Court of Session.*]

3. [*As to the removal of Sheriff-Substitutes.*]

4. [*Sheriff-Substitutes to continue to hold office on the death of Deputes.*]

5. [*Sheriff-Substitutes to reside within their sheriffdoms.*].—And be it enacted, That every person holding the office of Sheriff-Substitute and receiving salary on that account shall reside personally within his jurisdiction, and shall not be absent therefrom more than six weeks in any year, nor for more than two weeks at any one time, nor so as to interfere with the regular sittings of his court, without the special consent in writing of the Sheriff of such county for the time being, who shall be bound, in the event of his giving such consent, either to attend personally during the absence of such substitute, or to appoint another fit person as substitute to act in his stead ; and it shall not hereafter be lawful for any Sheriff-Substitute so receiving salary to act as agent either in legal, banking, or other business, or as conveyancer, factor, or chamberlain, except for the Crown, or to be appointed to any office, except such office as shall be by statute attached to the office of Sheriff-Substitute.

6. [*Superannuation allowances to Sheriff-Substitutes.*].—And be it enacted, That Her Majesty, and her heirs and successors, may grant an annuity, payable in like manner as salaries to Sheriff-Substitutes, to any person who has held, now holds, or may hereafter hold the office of Sheriff-Substitute, according to the proportions and with reference to the amount of their salaries and the periods of their services, as hereinafter mentioned, if from old age or any permanent infirmity such person has been or shall hereafter be disabled from the due exercise of his office : Provided always, that such annuity shall not exceed one-third of the salary payable to such person in case the period of his service shall have been not less than ten years, and shall not exceed two-thirds of such salary in case the period of service shall have been not less than fifteen years, and shall not exceed three-fourths of such salary in case the period of service shall have been not less than twenty years or upwards : Provided also that no such annuity shall be granted unless such Sheriff-

Substitute shall have duly fulfilled the duties of his office during one of the periods before mentioned, and is from old age or permanent infirmity disabled from the due exercise of his office, which facts shall be certified by the Lord President, the Lord Justice-Clerk, and the Lord Advocate for the time being, as having been established to their satisfaction by proper evidence.

7. [*Office of Sheriff-Substitute of Leith to cease.*]

8. [*Summary complaint for removing from premises let for less than a year.*—And whereas it is expedient to diminish the expense and delay with which the process of removing from houses and other heritable subjects, of the rent hereinafter provided, let for any shorter period than a year, in *Scotland* is attended; be it enacted, that where houses or other heritable subjects in *Scotland* are let for any shorter period than a year, at a rent of which the rate shall not exceed thirty pounds *per annum*, it shall be competent for any person, authorised by law, to pursue a removing therefrom, to present a summary complaint to the Sheriff of the territory, who shall order it to be served, and the defender to appear on such day as he may in each case think proper, in the form or to the effect of Schedule (A.) annexed to this Act.

9. [*Defender may be reponed against decree in absence.*—And be it enacted, That if the defender shall fail to appear after being duly cited, the Sheriff shall proceed to determine the cause in the same manner as if the defender had been personally present: Provided always that where the decree shall have been pronounced in absence, and shall not have been carried into execution, the defender may present a petition to the Sheriff for a further hearing of the cause, with evidence of intimation thereof having been made to the opposite party written thereon; and the Sheriff, if he shall see cause, and upon payment by the defender to the complainer of such expenses as the Sheriff may judge reasonable, may recall his decree, and proceed to hear and determine the cause as on the original complaint without delay; and provided also that, where decree shall be pronounced in absence, the Sheriff may give such order for preservation of the goods and effects of the defender as he may deem proper.

10. [*Warrant to cite witnesses and provision as to fees.*—And be it enacted, That the complaint or copy thereof served on the defender shall be a sufficient warrant to any sheriff-officer to cite witnesses or havers for either party to appear on the day of trial, and give evidence in such summary cases of removing; and the fees allowed to the clerk or officers of court on such complaint and proceedings shall be the same as those allowed on summonses and similar proceedings in small-debt causes in Sheriff Courts in *Scotland*, under an Act passed during the last session of Parliament, intituled, *An Act for the more effectual recovery of small debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the trial of small-debt causes by the Sheriffs*, in *Scotland* (7 Will. IV. & 1 Vict. c. 41): Provided always that the travelling expenses of officers and their assistants

under the said recited Act and this Act shall not be allowed for more than the distance from the residence of the officer employed to the place of execution or service, in case such distance shall be less than from the court-house to such place; and the Sheriff shall have power to modify such expenses in case the officer residing nearest to the place of execution or service shall not be employed; and provided also that such travelling expenses shall not be allowed against an opposite party for a greater distance than twelve miles.

11. [*Citation and further procedure in removings to be the same as provided for small-debt causes—Judgments to be final.*].—And be it enacted, that the citation and further procedure in such summary removings shall, in so far as not provided for by this Act, be the same as those established by the said recited Act for the trial of small-debt causes in Sheriff Courts; and where decree of removing is pronounced, it shall be in the form or to the effect of the said schedule (A.), and shall have the full force of a decret of removing and warrant of ejection; and the judgments to be pronounced in such summary actions of removing shall be final, and not subject to review either in the Circuit Court of Justiciary or in the Court of Session.

12. [*Sheriff may adjourn the cause.*].—And be it enacted, That the Sheriff may, of consent of parties, or where the ends of justice require it, adjourn the further hearing of or procedure in any summary process of removing raised under the authority of this Act, and he may likewise order written answers to be given in to the complaint; and all such orders shall be final, without being subject to appeal or advocacy: Provided always, that the Sheriff shall in all such cases where the defences cannot be instantly verified ordain the defender to find caution for violent profits.

13. [*Where defender has found caution, he may give in written answers to complaint.*].—And be it further enacted, That in all cases where the defender has found caution, he shall be allowed to give in written answers to the complaint; and in all cases where written answers shall be ordered, such cases shall thereafter be conducted, as nearly as may be, according to the forms in use in ordinary processes of removing, and the judgment of the Sheriff therein shall be subject to review in common form.

14. [*Members of College of Justice not exempt.*].—And be it enacted, That no person shall be exempt from the jurisdiction of the Sheriff in any process of removings raised under the authority of the Act, on account of privilege, or being a member of the College of Justice, or otherwise.

15. [*Sheriff's jurisdiction extended in questions of nuisance and servitude.*].—And be it enacted, That the jurisdiction, power, and authority of Sheriffs of Scotland shall be, and the same are hereby extended, to all actions or proceedings relative to questions of nuisance or damages arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or prædial servitudes; and all parties against whom such actions or proceedings may be brought shall be

amenable to the jurisdiction of the Sheriff of the territory within which such property or servitude shall be situated.

16. [*Transmission-book to be kept by Sheriff-Clerks.*—And be it enacted, That the Sheriff-Clerk of every Sheriff Court shall keep a book in which he shall enter in a tabular form, in columns, in the form of schedule (B.) hereto annexed, every cause transmitted to the Sheriff or Sheriff-Substitute in order to be advised, specifying, in separate columns, ordinary and summary causes, the Sheriff to whom the same has been transmitted, the date of such transmission, the date of the cause being received by the Sheriff and returned advised, and any remarks which the Sheriff may enter or direct to be entered in such book relative to any such cause; and an inventory of the process shall be kept by the clerk, in which the borrowing and returning of processes shall be entered; and no process shall be given up by the clerk without a receipt upon such inventory.

17. [*Additional Court-days to be appointed to dispose of arrears of business.*]—And be it enacted, That in case there shall be an arrear of business undisposed of by the Sheriff in any Sheriff Court it shall be the duty of the Sheriff from time to time to appoint additional court-days, whether in time of session or vacation, for the purpose of disposing of such arrear.

18. [*Sheriffs may repon against decrees in absence.*—And be it enacted, That where decree in absence in any civil cause shall have been pronounced or extracted in any Sheriff Court, other than in causes in the Small-Debt Court, or in processes of removing raised under authority of this Act, a petition may be presented to the Sheriff Court in which such decree was pronounced, to be reponed against the said decree, and any letters of horning or charge following thereon, where the same shall not have been implemented in whole or in part, and on consignment in the hands of the Clerk of Court of the expenses incurred, as the same may be modified on taxation, the said Sheriff shall repon the defender, and revive the action or proceeding in which such decree had been pronounced, as if decree had not been pronounced or extracted, and shall have power to award to the pursuer such part of the expenses consigned as he may judge reasonable; and the Sheriff shall pronounce such order for intimation to and appearance of the opposite party as may be just; and such order may be executed against a person in any other county as well as in the county where such order is issued, the same being previously indorsed by the Sheriff-Clerk of such other county, who is hereby required to make and date such indorsation; and such order being so made and executed, all further orders and interlocutors in the cause shall be sufficient and effectual.

19. [*Suspensions competent in Sheriff Courts of charges for sums under £25.*—And be it enacted, That where a charge shall be given on a decree of registration proceeding on a bond, bill, contract, or other form of obligation, registered in any Sheriff-Court books, or in the books of Council and Session, or any others competent, or on letters of horning following on such



decree, for payment of any sum of money not exceeding the sum of twenty-five pounds of principal, exclusive of interest and expenses, any person so charged may apply by petition to the Sheriff Court of his domicile for suspension of the said charge and diligence on caution; and on sufficient caution being found in the hands of the Clerk of Court for the sum charged for, and interest and expenses to be incurred in the Sheriff Court, the Sheriff shall have power to sist execution against the petitioner, and to order intimation of the petition of suspension and answers to be given in thereto, and thereafter to proceed with the further disposal and decision of the cause in like manner as in summary causes in such Court, and to suspend the charge and diligence so far as regards the petitioner; provided that the said order for intimation and answers as aforesaid may be made and carried into execution against any person in any other county as well as in the county where such order is issued, in manner and to the effect hereinbefore provided.

20. [*Sheriff's judgment on preliminary objection to suspension final.*—And be it enacted, That if any petition of suspension as aforesaid shall be presented in any Sheriff Court, and a preliminary objection be made to the competency of such a petition, or to the regularity thereof, an appeal against the judgment of the Sheriff-Substitute repelling or sustaining such objection may be taken in common form to the Sheriff, whose judgment thereon shall be final, and not subject to review either in the Circuit Court of Justiciary or in the Court of Session.

21. [*Sheriff's jurisdiction in maritime causes under 1 Will. IV. c. 69 explained.*—And whereas by an Act passed in the first year of the reign of his late Majesty King William the Fourth, intituled *An Act for uniting the benefits of jury trial in civil causes with the ordinary jurisdiction of the Court of Session, and for making certain other alterations and reductions in the judicial establishments of Scotland*, it is enacted, that the Sheriffs of Scotland shall within their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of Scotland, of the same nature as that heretofore held and exercised by the High Court of Admiralty: And whereas doubts have arisen regarding the extent of such jurisdiction, and it is expedient that such doubts should be removed; be it therefore enacted and declared, that the said recited Act shall be construed and held to mean that the powers and jurisdictions formerly competent to the High Court of Admiralty of Scotland in all maritime causes and proceedings, civil and criminal, shall be competent to the said Sheriffs and their Substitutes, provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised; and provided also, that it shall not be competent to the Sheriff to try any crime committed on the seas which it would not be competent for that judge to try if the crime had been committed on land.

22. [*Caution judicatum solvi not required in maritime causes in Sheriff Courts.*—And be it enacted, That in maritime causes or proceedings raised or brought before any Sheriff Court in *Scotland* caution *judicatum solvi* or *de damnis et impensis* shall not be required in any such cause or proceeding from any party who shall be domiciled in *Scotland*, any law or practice to the contrary notwithstanding, unless the judge shall require it on special grounds, to be stated in the interlocutor requiring the same, or a note annexed thereto.

23. [*Summonses, &c., in Sheriff Courts to be served in presence of one witness.*—And be it enacted, That summonses, petitions, complaints, charges, arrestments, and other proceedings in Sheriff Courts, excepting poindings, shall be deemed to be duly served and executed, provided the same shall be served or executed by the usual officer of the law in such Courts in presence of one person, who shall witness such service or execution, and both of whom shall attest the execution of the same by their subscriptions in common form.

24. [*Citation of parties, witnesses, and havers.*—And whereas it is expedient to authorise citation to Sheriff Courts of persons in *Scotland* without the necessity of having recourse to letters of supplement from the Court of Session ; be it enacted, that it shall be competent to cite all persons within *Scotland* as parties in any civil or criminal action or proceeding in any Sheriff Court who may be amenable to the jurisdiction of such Court in respect of such action or proceeding, by the warrant of such Sheriff Court ; and it shall also be competent to cite witnesses and havers within *Scotland* in any civil or criminal action or proceeding in any such Courts by the warrant of such Courts ; and all such warrants shall have the same force and effect in any other sheriffdom as in that in which they were originally issued, the same being first endorsed by the Sheriff-Clerk of such other sheriffdom, who is hereby required to make and date such endorsement ; and such citation duly made shall be deemed to be due and regular citation ; and if any witness or haver duly cited shall fail to appear, it shall be competent to any party for whom such witness or haver is cited to apply for a new warrant to compel his attendance at such Court, at such reasonable time as may be fixed, which warrant shall require such witness or haver to attend as aforesaid under a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained ; and every such penalty shall be paid to the party applying for the new warrant as aforesaid, and shall be recovered in the same manner as penalties under the before-recited Act for the more effectual recovery of Small Debts in the Sheriff Courts, or under any Act by which the same shall have been or may be repealed, altered, or amended, without prejudice always to letters of second diligence for compelling witnesses and havers to attend as at present competent ; and it shall be competent to execute and carry into effect such letters of second diligence in any other sheriffdom, the same being endorsed by the Sheriff-Clerk of that sheriffdom, as before provided : Provided always that nothing in this Act contained shall affect the competency of applying for and obtaining letters of supplement in

common form for the purpose of citing such parties, witnesses, or havers ; and provided also, that it shall be no objection to any witness or haver that he has appeared without citation.

25. [*Sheriffs' criminal warrants may be executed out of the county.*]

26. [*Sheriff of two counties may hold Commissary Court in either.*]

27. [*Sheriffs' juries may be summoned from list of jurors residing within certain distance of Court to which they are summoned.*]

28. [*Emoluments of future Sheriff-Clerks to be regulated.*]

29. [*Existing Sheriff-Clerks and Officers not to acquire vested right to increased fees.*]

30. [*Citations, &c., in Zetland.*].—And be it enacted, That hereafter all proclamations, denunciations, edictal citations, and other public notices made at the market cross of the burgh of *Lerwick*, in *Zetland*, shall be equally valid as if the same had been made as heretofore at the gate of the Castle of *Scalloway*.

31. [*Power of Court of Session to make regulations by Acts of Sederunt, &c., not to be affected.*]

32. [*Sheriffs to meet periodically, and to submit propositions to the Court.*]

33. [*Agents qualified to practise before Court of Session may practise in Sheriff Courts.*]

34. [*Meaning of words in this Act.*].—And be it enacted, That in all cases in this Act the word "person" shall extend to a partnership or body politic, corporate, or collegiate, as well as to an individual ; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing ; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things ; and every word importing the masculine gender only shall extend and be applied to a female as well as a male : Provided always, that those words and expressions occurring in this clause to which more than one meaning is attached shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

35. [*Commencement of Act.*]

36. [*Act may be amended.*]

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## SCHEDULES referred to in the foregoing Act.

### SCHEDULE (A).

#### No. 1.—*Form of Summary Complaint.*

Unto the Honourable the Sheriff of the County of

Complains *A B* [*name and design the complainer*] against *C D* [*name and design the defender*] that the complainer [*or his author, as the case may*

be], let to the said defender [or his author, as the case may be] a dwelling-house, garden, and pertinents [or other subjects, as the case may be], situate in \_\_\_\_\_, for the period from \_\_\_\_\_ to \_\_\_\_\_; that the said defender is bound to remove from the said subjects at the date last mentioned, and it is necessary to obtain decree of removing against him [or, as the case may be, refuses or delays to remove therefrom, although the period of his lease has expired]: Therefore decret ought to be granted for removing and ejecting the said defender, his family, sub-tenants, cottars, and dependents, with their goods and gear, furth and from the said subjects [here insert the date at which the removal or ejection is sought for, as the case may be], that the complainer or others in his right may then enter to and possess the same. [If expenses are sought, add, and the said defender ought to be found liable in expense of process and dues of extract.]  
 [Signature of the Party or Agent.]

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#### No. 2.—Form of Warrant thereon.

The Sheriff grants warrant to cite the said defender to compear personally before him at the Court-house [or elsewhere, as the case may be], upon the [insert the day of the month, and hour if need be], to answer the foregoing complaint, under certification of being held as confessed; ordains such citation to be made at least [state the period which the Sheriff may fix to intervene betwixt the citation and diet of compearance], previous to the said diet of compearance; and grants warrant to cite witnesses for both parties to appear, time and place foresaid, to give evidence in the said matter, under the pains of law. Given under the hand of the Clerk of Court at the \_\_\_\_\_ day of \_\_\_\_\_.

Sheriff-Clerk.

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#### No. 3.—Form of Citation for Defender.

C D, defender above designed, you are hereby summoned to appear and answer before the Sheriff in the matter complained of, and that at [here specify time and place], under certification of being held as confessed.

This notice is served upon the \_\_\_\_\_ day of \_\_\_\_\_, by me, \_\_\_\_\_, Sheriff-Officer.

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#### No. 4.—Form of Execution of Citation.

Upon the \_\_\_\_\_ day of \_\_\_\_\_ I duly summoned the above designed C D, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification, above set forth. This I did by delivering a copy of the above complaint, with a cita-

tion thereto annexed, to the said defender personally [or otherwise, as the case may be].  
*Sheriff-Officer.*

*No. 5.—Form of Decree and Warrant of Ejection.*

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, the which day the Sheriff [in absence of the defender, or having heard parties, as the case may be], decerns and grants warrant for removing and ejecting the said *O D*, defender, and others mentioned in the complaint, from the subjects therein specified, such ejection not being sooner than [here insert the time appointed for removal, and whether after a charge on such induciæ as may be deemed proper, or instantly], finds the said defender liable in expenses [or otherwise, as the case may be], and decerns.

*Sheriff's Signature.*

*Note.*—The whole of the above to be in the same paper.

SCHEDULE (B).

*Transmission Book to be kept by Sheriff-Clerks.*

| Names of Cause<br>[as <i>A</i> versus <i>B</i> ,<br>or <i>A</i> , Petitioner,<br>&c.] |                    | Date of<br>Transmission to<br>Sheriff-<br>Substitute. | If Proof<br>led, state<br>whether<br>before<br>Sheriff, or<br>Substitute,<br>or Com-<br>missioner,<br>and its<br>duration. | Date of<br>Case being<br>returned<br>and ad-<br>vised. | Date of<br>Transmis-<br>sion to<br>Sheriff. | Date of<br>Cause<br>being re-<br>turned<br>and ad-<br>vised. | REMARKS.* |
|---|--------------------|---|--|--|---|--|-----------|
| Ordinary<br>Causes.   | Summary<br>Causes. |   |  |  |   |  |           |
|   |                    |   |  |  |   |  |           |

\* *Note.*—Where cases have been longer than ten days unadvised after transmission to the Sheriff, the reason to be stated in this column.

Also the names of any commissioners to whom remits have been made to take proofs.

## SCHEDULE (C).

*Table of Fees in Civil Business for the Sheriff-Clerks of Scotland.*

|  | In cases of<br>£12 and under. |    |    | Above £12. |    |    |
|--|-------------------------------|----|----|------------|----|----|
|  | £                             | s. | d. | £          | s. | d. |
| Libel, Summons, or claim to found an action,<br>When more defenders than one are sued for<br>a separate deed or prestation, the above<br>fees to be paid on one of the debts or<br>prestations highest in amount, and a<br>third of the above fees to be paid for<br>each of the other debts or prestations,<br>according to the amount of the claim<br>against each defender or set of defenders. | 0                             | 0  | 9  | 0          | 1  | 3  |
| Certifying copy of libel, in terms of Act of Sede-<br>runt for Sheriff Courts, c. 18, § 4, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 6  |
| Summary petition or complaint (except petition of<br>sequestration), and deliverance thereon, . . . . .  | 0                             | 1  | 0  | 0          | 1  | 6  |
| Defence, answer, or first paper for each defender<br>or set of defenders, or compeerer or set of com-<br>peerers in any action, . . . . .  | 0                             | 0  | 6  | 0          | 1  | 0  |
| Each paper or pleading for either party, subse-<br>quent to the first step, including objections and<br>answers in a proof when stated in separate<br>papers, . . . . .  | 0                             | 0  | 3  | 0          | 0  | 6  |
| Appeal to the Sheriff-Depute, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 6  |
| Receiving and marking each set of productions, ex-<br>cept the productions lodged with the first paper<br>for each party, for which no charge is to be<br>made, . . . . .  | 0                             | 0  | 3  | 0          | 0  | 3  |
| Extracting each decret in absence, in the abridged<br>form, . . . . .  | 0                             | 1  | 0  | 0          | 1  | 6  |
| When a decret is extracted against more de-<br>fenders than one sued for a separate debt<br>or prestation, the above fee of extract<br>to be paid on one of the debts or presta-<br>tions highest in amount, and a third of<br>the above fee for extract to be paid on<br>each of the others, according to the amount<br>of the claim against such defender or set of<br>defenders.                |                               |    |    |            |    |    |
| Extracting each decree <i>in foro</i> , in the abridged<br>form, . . . . .   | 0                             | 2  | 0  | 0          | 2  | 6  |
| If the decree, whether in absence or <i>in foro</i> , shall<br>exceed one sheet for writing, each succeeding<br>sheet, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 6  |
| Recording abridged decreets, per sheet, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 6  |
| Indorsing decrees or warrants, and dating and re-<br>cording such indorsation, . . . . .   | 0                             | 1  | 0  | 0          | 1  | 0  |

|   | In Cases of<br>£12 and under. |    |    | Above £12. |    |    |
|---|-------------------------------|----|----|------------|----|----|
|   | £                             | s. | d. | £          | s. | d. |
| Protestations for not insisting, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| Extract thereof, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| Acts and commissions, first sheet, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| Subsequent sheets, each, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| If the proof be taken on the interlocutor allowing it, without extracting an act and commission, there will be paid by each party leading proof, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| Diligence or precept for citing parties incidentally, witnesses or havers, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| Second diligence, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 9  |
| Each deposition or declaration, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 9  |
| Writing each sheet thereof, after the first, when the Sheriff-Clerk acts as writing clerk, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 6  |
| The Sheriff-Clerk or his depute, when acting as commissioner in taking a proof, deposition of party, or declaration, will be allowed the following fees, viz. :—  |                               |    |    |            |    |    |
| In causes not exceeding £8, each hour, . . . . .  | 0                             | 1  | 3  | ...        |    |    |
| Above £8, and not exceeding £25, each hour, . . . . .   | 0                             | 2  | 0  | ...        |    |    |
| Above £25, each hour, . . . . .   | 0                             | 2  | 6  | ...        |    |    |
| As also his clerk's fee for writing, at the rate of 4d. per sheet.  |                               |    |    |            |    |    |
| Sequestration of a tenant's effects, or of joint-tenants in one possession, viz. :—   |                               |    |    |            |    |    |
| Warrant of sequestration, and service, . . . . .  | 0                             | 1  | 3  | 0          | 1  | 6  |
| Taking the inventory, when taken by the clerk, if the rent to be secured be £12 or under—   |                               |    |    |            |    |    |
| Clerk and witnesses, . . . . .  | 0                             | 2  | 6  | ...        |    |    |
| When the rent is above £12 and does not exceed £25—   |                               |    |    |            |    |    |
| Clerk and witnesses, . . . . .  | ...                           |    |    | 0          | 3  | 9  |
| When the rent is above £25 and does not exceed £50—   |                               |    |    |            |    |    |
| Clerk and witnesses, . . . . .  | ...                           |    |    | 0          | 5  | 0  |
| When the rent is above £50—   |                               |    |    |            |    |    |
| Clerk and witnesses, . . . . .  | ...                           |    |    | 0          | 6  | 3  |
| Writing out inventory and schedule, per sheet of each, in any of the above cases, . . . . .   | ...                           |    |    | 0          | 0  | 6  |
| If the clerk and witnesses are necessarily employed more than two hours in taking the inventory, or travelling for that purpose, he will be allowed, in addition to the above fees, for every hour after the first two— |                               |    |    |            |    |    |
| Clerk and witnesses, . . . . .  | 0                             | 0  | 9  | 0          | 0  | 9  |
| But under these charges for the hours after the first two, the clerk not to   |                               |    |    |            |    |    |

|  | In Cases of<br>£12 and under. | Above £12. |
|--|-------------------------------|------------|
|  | £ s. d.                       | £ s. d.    |
| have in one day for himself and witnesses more than 5s.  |                               |            |
| Warrant of sale, . . . . .   | 0 0 6                         | 0 1 0      |
| Extract thereof, per sheet, when required, . . . . .   | 0 0 6                         | 0 1 0      |
| Intimating sale to tax-office, . . . . .   | 0 0 6                         | 0 0 6      |
| The clerk, when he executes any warrant to roup, and collects the proceeds, will be held liable for the amount of the roup-roll, and will be allowed for his trouble and risk, including auctioneer's fees, as follows:—   |                               |            |
| When the amount of the roup-roll is £8 or under, he will be allowed 3s. 9d.  |                               |            |
| When the amount of the roup-roll is above £8, and does not exceed £100, he will be allowed at the rate of 2½ per cent.   |                               |            |
| When the amount of the roup-roll exceeds £100, but does not exceed £1000, he will be allowed 2½ per cent. for the first £100, and for every additional £100, or part of £100, 1½ per cent. And when the amount exceeds £1000, he will be allowed the above rates for the first £1000, and 1 per cent. for each additional £100 and part of £100.   |                               |            |
| The above poundage to cover all charges for trouble in relation to the sale, and for collecting the proceeds, drawing advertisements and articles of roup; but the clerk will be allowed all his necessary disbursements or expenses, such as advertising, paying crier, travelling charges, &c. He will also, when the proceeds are above £20, be allowed 3s. 9d. for an assistant-clerk. |                               |            |
| If roup be stopped after time of sale is fixed, . . . . .  | 0 1 3                         | 0 1 3      |
| Receiving the report of sale, and note of the sum arising from it, and marking the same, . . . . .   | 0 0 6                         | 0 0 6      |
| Allowing inspection of the same, . . . . .   | 0 0 6                         | 0 0 6      |
| In sales under other warrants of the Sheriff, including poundings, the same fees to be paid as in sales under sequestrations.  |                               |            |



|   | In Cases of<br>£12 and under. |    |    | Above £12. |    |    |
|---|-------------------------------|----|----|------------|----|----|
|   | £                             | s. | d. | £          | s. | d. |
| At intimating caption to compel return of a process, including dues of caption, if issued, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 6  |
| Enrolling a cause, to be paid by the party requiring enrolment, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 6  |
| When any cause at avizandum is enrolled by order of the Sheriff, the above fee to be paid by the parties equally.   |                               |    |    |            |    |    |
| At borrowing a process, or part of a process, the clerk being for this fee bound to compare the process, both when borrowed and returned, and to mark the return, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 6  |
| Attending at judicial inspections or visitations, when required by the Sheriff or either of the parties, sealing up repositories, or executing any other order or warrant of the Sheriff, not otherwise provided for in this table— |                               |    |    |            |    |    |
| First hour employed, . . . . .  | 0                             | 2  | 0  | 0          | 2  | 6  |
| Every other hour, . . . . .   | 0                             | 1  | 3  | 0          | 2  | 0  |
| Besides necessary outlays.  |                               |    |    |            |    |    |
| Auditing accounts of expenses when remit made to the clerk—   |                               |    |    |            |    |    |
| In decrees in absence, . . . . .  | 0                             | 0  | 6  | 0          | 0  | 6  |
| In litigated cases, when the amount of the account rendered is under £5, . . . . .  | 0                             | 1  | 9  | 0          | 1  | 9  |
| When £5 and under £10, . . . . .  | 0                             | 2  | 6  | 0          | 2  | 6  |
| When £10 and under £20, . . . . .   | 0                             | 3  | 6  | 0          | 3  | 6  |
| When £20 and under £40, . . . . .   | 0                             | 5  | 0  | 0          | 5  | 0  |
| When £40 and under £60, . . . . .   | 0                             | 6  | 0  | 0          | 6  | 0  |
| When £60 and under £80, . . . . .   | 0                             | 7  | 6  | 0          | 7  | 6  |
| When £80 and upwards, . . . . .   | 0                             | 10 | 6  | 0          | 10 | 6  |
| Caveat, . . . . .   | 0                             | 0  | 6  | 0          | 0  | 6  |
| Precepts or warrants of arrestment, when contained in the summons, . . . . .  | 0                             | 0  | 3  | 0          | 0  | 3  |
| When not contained in the summons, . . . . .  | 0                             | 0  | 9  | 0          | 1  | 0  |
| At loosing an arrestment in either case, . . . . .  | 0                             | 0  | 9  | 0          | 1  | 0  |
| Each bond of caution and relative certificate, . . . . .  | 0                             | 2  | 6  | 0          | 3  | 9  |
| Edict or summons of curatory, or for giving up inventories, . . . . .   | 0                             | 1  | 3  | 0          | 1  | 3  |
| Calling in court, receiving and entering the nomination of curators, . . . . .  | 0                             | 2  | 6  | 0          | 2  | 6  |
| Docqueting and signing tutorial or curatorial inventories, per sheet of each duplicate, . . . . .   | 0                             | 0  | 3  | 0          | 0  | 3  |
| Extract acts of curatory, or upon production of inventories—  |                               |    |    |            |    |    |
| First sheet, . . . . .  | 0                             | 2  | 6  | 0          | 2  | 6  |
| Every other sheet, . . . . .  | 0                             | 1  | 3  | 0          | 1  | 3  |
| Second extracts, per sheet, . . . . .   | 0                             | 1  | 3  | 0          | 1  | 3  |

|   | In Cases of<br>£12 and under. |    |    | Above £12. |    |    |
|---|-------------------------------|----|----|------------|----|----|
|   | £                             | s. | d. | £          | s. | d. |
| Production of a bill of advocation, and marking the same, including trouble of transmitting the process when necessary, . . .   | ...                           |    |    | 0          | 2  | 0  |
| Transmitting extracted processes, in consequence of a warrant from the Court of Session or the Sheriff, . . .   | 0                             | 0  | 9  | 0          | 1  | 3  |
| Appeal against a decree or sentence of the Sheriff to the Court of Justiciary or Circuit Court, or answers thereto, . . .   | 0                             | 1  | 0  | 0          | 1  | 3  |
| Searching for a process in which no procedure has taken place for a year, if search does not exceed five years, and no extract ordered, . .   | 0                             | 0  | 6  | 0          | 1  | 0  |
| Each additional year after the first five in which the search is made, . . .  | 0                             | 0  | 3  | 0          | 0  | 3  |
| For each consignation of money in the clerk's hands, if under £10, . . .  | 0                             | 1  | 3  | 0          | 1  | 3  |
| And an additional fee for the amount above £10 at the rate of 5s. on each £100 consigned.   |                               |    |    |            |    |    |
| On the lodging of a bank receipt when money ordered to be consigned is lodged in a bank instead of being consigned, . . .   | 0                             | 1  | 3  | 0          | 1  | 3  |
| The fees in these three last articles not to be chargeable on proceeds of rouns or sales conducted by the clerks.   |                               |    |    |            |    |    |
| Each warrant to uplift consigned money, . .   | 0                             | 1  | 3  | 0          | 1  | 3  |
| Full extract, or second extract, or authenticated copy of a process or part of a process, or other procedure or paper, when required by a party and furnished by the clerk, per sheet, . . .  | 0                             | 0  | 6  | 0          | 0  | 9  |
| <i>Note.</i> —In all cases where the conclusions are <i>ad factum præstandum</i> , or not entirely pecuniary, the highest class to be the rate of charge; but fees on paper in summonses of removal or rejection to be charged according to the rent of the subject from which the defender is summoned to remove or to be ejected. |                               |    |    |            |    |    |
|   | £                             | s. | d. |            |    |    |
| Recording hornings, inhibitions, interdictions, law-burrows, with their executions, discharges, and other writings recorded in the Registers of Hornings and Inhibitions, per sheet, . . .  | 0                             | 0  | 10 |            |    |    |
| First or subsequent extracts thereof, when required, per sheet, . .   | 0                             | 0  | 9  |            |    |    |
| Recording bonds, tacks, dispositions, and other writings in the register of deeds and probative writs, per sheet, . . .   | 0                             | 0  | 9  |            |    |    |
| First extracts of such deeds or writings, when required, per sheet, . . .   | 0                             | 0  | 6  |            |    |    |
| Subsequent extracts, per sheet, . . .   | 0                             | 0  | 9  |            |    |    |
| Recording protests on bills, including extract, . . .   | 0                             | 1  | 3  |            |    |    |

|   | £ | s. | d. |
|---|---|----|----|
| Subsequent extracts, . . . . .  | 0 | 0  | 9  |
| Recording accounts, states, and the like, per sheet of figures, . . . . .   | 0 | 1  | 0  |
| Extract thereof, per sheet, . . . . .   | 0 | 0  | 9  |
| Inspection of records of entailed vouchers, . . . . .   | 0 | 0  | 6  |
| Searching the record of hornings or inhibitions, including minute book, each year or part of a year, . . . . .              | 0 | 0  | 3  |
| In all not exceeding, . . . . .   | 0 | 3  | 9  |
| Searching for deeds recorded for the first year, or part of the year specified, . . . . .                                   | 0 | 0  | 6  |
| Every additional year, . . . . .  | 0 | 0  | 3  |
| Certificate of search, if required, . . . . .   | 0 | 1  | 3  |
| Inspection of records when a party or his agent makes the search, each record book and corresponding minute book, . . . . . | 0 | 1  | 3  |
| Examinations under the Bankruptcy Act, when the Sheriff-Clerk acts as clerk to the examination, each diet, . . . . .        | 0 | 3  | 9  |
| Writing declarations or oaths therein, per sheet, . . . . .   | 0 | 0  | 6  |

*General Service—* SERVICES.

|   |   |    |   |
|---|---|----|---|
| Procuring the brieve executed, and intimation to agent, . . . . .                                 | 0 | 1  | 9 |
| Attending to court at service, framing and recording the minutes, and instrument money, . . . . . | 0 | 3  | 6 |
| Fees of the service, . . . . .  | 0 | 10 | 0 |
| Engrossing the retour, . . . . .  | 0 | 2  | 6 |

*Special Service, or Service as Heir of Provision—*

|   |   |   |   |
|---|---|---|---|
| Procuring the brieve executed, and intimation to agent, . . . . .                         | 0 | 1 | 9 |
| Attending in court at service, framing the minutes, and recording, first sheet, . . . . . | 0 | 3 | 0 |
| Each other, . . . . .   | 0 | 1 | 0 |
| Framing the retour, first sheet, . . . . .  | 0 | 7 | 6 |
| Each other sheet, . . . . .   | 0 | 5 | 0 |
| Engrossing the retour, each sheet, . . . . .  | 0 | 1 | 0 |
| Extracts from the record of service, when required, each sheet, . . . . .                 | 0 | 1 | 0 |

*Infestments—*

|   |   |    |   |
|---|---|----|---|
| Drawing instrument of sasine on )   |   |    |   |
| Chancery precepts, first sheet, . . . . .   | 0 | 7  | 6 |
| Each subsequent sheet, . . . . .  | 0 | 5  | 0 |
| Extending the same, first sheet, . . . . .  | 0 | 1  | 6 |
| Each subsequent sheet, . . . . .  | 0 | 1  | 0 |
| Besides the stamped vellum or parchment.  |   |    |   |
| And that the clerk receive for taking infestment thereon, when the rent of the property does not exceed £100 per annum, . . . . . | 0 | 10 | 6 |
| £100 and not exceeding £200, . . . . .  | 1 | 1  | 0 |
| £200 and not exceeding £500, . . . . .  | 1 | 11 | 6 |
| £500 and not exceeding £1000, . . . . .   | 2 | 2  | 0 |
| And for every additional £1000, . . . . .   | 0 | 10 | 6 |
| But not to exceed in all, . . . . .   | 5 | 5  | 0 |
| And if the distance exceed three miles, each additional mile, until it exceeds ten miles, . . . . .                               | 0 | 2  | 6 |

|   | £ | s  | d |
|---|---|----|---|
| But under this charge not to receive more per day than, . . .   | 1 | 1  | 0 |
| Besides travelling charges.   |   |    |   |
| Extracts of minutes of procedure of freeholder meetings, when required, per sheet, . . . . .  | 0 | 1  | 3 |
| Each person taking the oaths to Government, when the oaths are not administered at a county meeting, . . . . .  | 0 | 1  | 0 |
| Certificate thereof, when required, . . . . .   | 0 | 1  | 6 |
| Qualifying a peer to vote at an election, . . . . .   | 1 | 1  | 0 |
| Extract of the fiars, each year, . . . . .  | 0 | 0  | 9 |
| Receiving each precept from the Court of Session, making up list of jury, and instructing officer to summon, and making return, . . . . .   | 0 | 2  | 6 |
| Receiving countermand of trial, and instructing officer, . . . . .  | 0 | 2  | 6 |
| Writing and booking each necessary letter, . . . . .  | 0 | 1  | 3 |
| Each duplicate and copy, . . . . .  | 0 | 0  | 6 |
| <i>Fees for Public Business payable in Exchequer—</i>   |   |    |   |
| For the principal precept of intimation of election of a Member of Parliament, besides expense of printing, . . . . .   | 0 | 10 | 6 |
| Writings relative to elections of Members of Parliament (exclusive of the precept), to summoning the Commissioners of Supply for laying on the land-tax, and to other public business payable in the Exchequer, each sheet, . . . . . | 0 | 1  | 0 |
| When consisting of more than one sheet, each additional sheet, . . . . .  | 0 | 1  | 6 |
| Superintending the execution of Chancery precepts, and returning the execution, for each precept, . . . . .   | 0 | 0  | 6 |
| Superintending the publication of royal proclamations or writs, each, . . . . .   | 0 | 5  | 0 |
| Warrant to summon jury and witnesses for striking the fiars and making list, and instructing officer to summon them, . . . . .  | 0 | 10 | 6 |
| Attendance at striking the fiars, and writing the evidence and procedure, and recording the verdict, . . . . .  | 1 | 11 | 6 |
| The Sheriff-Clerk for instructing the persons employed in taking up the list of jurors, receiving the returns, and engrossing the lists in the jury books, for each 100 names, exclusive of printing, . . . . .                       | 0 | 5  | 0 |
| To the district clerk, or other person having local knowledge, for attending and assisting the Sheriff at revising lists, at the rate of 21s. per day, including travelling charges and postages.                                     |   |    |   |

*N.B.*—The sheet of writings to be computed at three hundred words, when not otherwise specified; but if the writing does not contain three hundred words, to be charged as one sheet; and if after finding the sheet or sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than three hundred words shall remain, such fewer words shall be charged as a sheet. Although the fees for recording hornings, inhibitions, deeds, and other writings in the registers of hornings and inhibitions and of deeds and probative writs, are to be paid for at certain rates for every sheet, yet it is understood that the clerks are to frame those records so as to contain in each sheet the number of words prescribed by the regulations of the Lord Clerk Register.

The fees in the above table to be paid though the duty be performed by the clerk-depute or by an assistant-clerk, and to be exclusive of postages and outlays.

The fees in criminal and any other business to be subject to the regulation of the Lord High Treasurer or Commissioner of Her Majesty's Treasury, or any three of them, from and after the passing of this Act.

## ACT OF SEDERUNT for regulating the Form of Process in Sheriff Courts, prepared in Terms of the Act of 1st and 2nd Vict. c. 119, § 32.—Edinburgh, 10th July, 1839.\*

### PART I.—OF ORDINARY CIVIL ACTIONS.

#### Chap. I.—*Diets and Sessions of Court.*

1. Each Sheriff Court, except those held at a place where an ordinary Sheriff-Substitute does not reside, shall sit for the despatch of ordinary business at least one day in every week during the summer and winter sessions; such day to be fixed by the Sheriff in each county by a regulation of Court.

2. The winter session shall commence, at the latest, on the 15th of October, or first ordinary Court-day thereafter, and shall continue until the 4th day of April inclusive, except during the Christmas recess, which must not be longer than three weeks. The summer session shall commence on the first Court-day after the 15th of May, and continue until the last Court-day in July.

3. It shall be competent for each Sheriff to extend the duration of the sessions by a regulation of Court, and, in

particular, to appoint Court-days during the vacations. And in case there shall be any arrear of business undisposed of by the Sheriff, it shall be his duty, from time to time, to appoint additional Court-days, whether in time of session or vacation, for the purpose of disposing of such arrear (1 & 2 Vict. c. 119, § 17).

4. During the vacations, summary applications shall be received, and interlocutors in summary cases shall be dated and entered in the Court-book or diet-book, as in time of session.

5. The Sheriff of each county shall, before the termination of each session, appoint at least two Court-days during each vacation, the first towards the middle, the last towards the end of the vacation, for the despatch of all ordinary business, including the calling of new causes; and papers appointed to be put into process on these days must

\* Although much of this Act of Sederunt has been superseded, it is retained here in full, partly because almost none of it has been expressly repealed, and much of it is still useful, and partly because of its historical interest and of its being an instance of a praiseworthy attempt to embody the rules of procedure in one order. No success attended a proposal which I made about two years ago to consolidate in

one Act of Sederunt all the existing rules of practice. Judging from its reception by the press, the general public appeared (so far as it considered the matter) to entertain the idea with favour; but it was not taken up either by those members of the profession who had the power to carry it out, or by those for whose good it was meant. The proposal is reported in the *Journal of Jurisprudence* for February, 1881.

be lodged with the Sheriff-Clerk before the hour of meeting of the Court.

6. For seven days after each of these days, and after the last Court-day of

each session, it shall be competent to sign interlocutors in ordinary causes.

7. The reclaiming days shall run during the vacation.

### Chap. II.—*Form of the Summons.*

8. All defenders shall be cited upon a summons, signed on each page by the clerk, fully libelled, and having the name of the pursuer's procurator marked on the back.

9. Not more than six defenders, on separate grounds of action, shall be included in one libel, except in actions of multiplepoinding, mailis and duties, poinding of the ground, and forthcoming.

10. The summons must contain a concise and accurate statement of the facts, and must also set forth, in explicit terms, the nature, extent, and grounds of the complaint or cause of action, and the conclusions deduced therefrom.

Where an account is founded on, it shall be sufficient to refer to it by the first and last dates. The summons must bear a *partibus* for calling;—the sums concluded for must be marked in figures on the margin;—the true date of signing must be filled up;—and the clerk is discharged from calling any summons that is not marked and signed as directed.

11. No libel shall be amended after citation is given thereon, except by authority of the Sheriff.

12. Every libel or summons may also contain a warrant for arresting the defender's effects and debts on the dependence.

### Chap. III.—*Execution of the Summons.*

13. The officer who executes the summons shall deliver to the defender, if he find him, personally, or, if he do not find him, shall leave at his dwelling-place, a full copy of the summons to the will, with a copy of citation, in presence of one witness. When a libel is amended in absence of the defender, a copy of the amendment must be served upon him in the same manner, and on the same *inducia*, as the original libel. If there be more defenders than one, each shall be served with a copy of the libel, or of such part thereof as concerns himself. In actions of poinding the ground, mailis and duties, and forthcoming, the tenants and arrestees shall be served with short copies of citation, and the proprietor and common debtor with a full copy of the libel to the will. All copies of summonses served shall be signed on each page by the officer.

14. Edicts for choosing curators, summonses for curators giving up inventories, multiplepoindings, transferences, transumps, wakenings, and cognitions, may be executed by delivering a copy of citation before one witness, contain-

ing the names and designations of the pursuer and defender, and bearing the extent and special grounds of the pursuer's claim, without any copy of the summons.

15. All executions or returns shall be signed by the officer and the witness who was present at the execution, and shall specify whether the citation was given to the defender personally or otherwise; and if otherwise, shall specify particularly the mode of citation.

16. If any defender amenable to the jurisdiction of the Sheriff in whose court the summons is raised (1 & 2 Vict. c. 119, § 24) be not resident within that sheriffdom, he may be cited by warrant of the said Sheriff, provided the same be indorsed by the Sheriff-Clerk of the sheriffdom within which the defender resides.

17. Where an officer returns an irregular or defective execution, he shall be liable to the party who employed him in damages, which it shall be in the power of the Sheriff to award summarily in the course of the process; and such officer may also be punished as the Sheriff shall think the case merits.

18. If the officer executes the warrant of arrestment contained in the summons by arresting the defender's effects, he must forthwith return an execution of arrestment to the clerk.

19. The name of the pursuer's procurator shall be marked on the back of the copy of the libel, and on the citation left for the defender.

#### Chap. IV.—*Diet of Compareance.*

20. All summonses shall contain a warrant for citing the defender to compare on the seventh day next after the date of citation, if a Court-day, or, if not, on the first Court-day thereafter (except in the cases after mentioned), with continuation of days; and the citation shall be conform to such warrant.

be printed or written at the foot of all copies of citations.

21. In the case of libels or edicts for choosing curators, and of summonses for giving up inventories, the defenders shall be cited to appear on the tenth day after the date of citation, if a Court-day, or, if not, on the first Court-day thereafter, with continuation of days.

22. When the defender is a minor, his tutors and curators shall be called edictally upon the same *inducit* as the principal defender.

*Note.*—It is recommended that a note of the days of the week on which the ordinary Courts are held, should

#### Chap. V.—*Calling of the Cause, and Non-compearance of the Defender.*

23. The summons may be called upon the day to which the defender has been cited—namely, the seventh day, if a Court-day, or upon the first Court-day thereafter,—and the pursuer, at the calling, must, along with his summons, produce the deeds, accounts, and other writings on which he founds, so far as the same are in his custody, or within his power, or state where he believes them to be, in which case the Sheriff may grant him a diligence for recovering them.

24. If the defender be absent at the calling of the cause, the Sheriff may either hold him as confessed and decern, or allow such competent proof in support of the libel as the pursuer or his procurator shall require, or the Sheriff may deem necessary; but before pro-

ceeding in the proof, it must be shown to the Sheriff, or commissioner taking the proof, that regular notice of the appointment for proof has been given to the defender. (See § 115 *infra*.) And the defender shall not be reponed against the decree in absence, or interlocutor allowing the proof, unless he shall apply to have the decree or interlocutor recalled, as hereinafter directed, by a petition, accompanied with defences prepared in terms of Chapter VII., §§ 32 and 33, and shall consign in the hands of the Clerk of Court the expenses incurred, as modified on taxation—1 & 2 Vict. c. 119, § 18)—and the Sheriff shall have power to award to the pursuer such part of the expenses consigned as he may judge reasonable.

#### Chap. VI.—*Protestation by the Defender for not Insisting.*

25. Upon the day of compareance, or any subsequent Court-day during the currency of the summons, if the defender produce the copy thereof given to him, and if the pursuer fail to appear and insist, the defender may crave protestation for not insisting, which the Sheriff shall admit, and modify the protestation-money, according to circumstances,

so as to indemnify the defender for his trouble and expenses, besides the dues of extract.

26. No protestation shall be extracted till the expiry of seven free days after the day on which the same was granted, excepting in cases where arrestments have been used, when the protestation may be extracted and given out on the

lapse of forty-eight hours. The protestation, when extracted, may contain a precept of poinding and arrestment for recovery of the protestation-money, and the dues of extract.

27. If protestation be not extracted, the pursuer shall be allowed to call and insist in his action without a new citation, upon paying over to the defender or his procurator, or, in his absence

after due intimation or refusal to accept, consigning in the clerk's hands, for the defender's use, the sum awarded in name of protestation-money, except the expense of extract.

28. In case the protestation be extracted, the instance shall fall, and the defender shall not be obliged to answer, except upon a new summons, and citation on the ordinary *inducia*.

#### Chap. VII.—*Procedure when Appearance is made for Both Parties.*

29. The defender or his procurator, if prepared, may give in his defences to the libel at the calling of the cause; but if he crave to see the libel, in order to state his defences, the defences shall be lodged on or before the seventh day thereafter, and if such seventh day be a Court-day, before the hour of meeting of the Court; with power to the Sheriff to appoint an earlier or a later day, when, from the nature of the case, he may see cause to do so.

30. A procurator appearing for a defender must produce, along with his defences, either a written mandate from the defender, or the copy of citation given to the defender.

31. When there are more defenders than one appearing by different procurators, the procurator for the pursuer shall make out a copy or copies of the summons, or an excerpt or excerpts thereof, applicable to the case of each defender or set of defenders appearing by one procurator, which shall be signed and certified by the clerk of Court, and given out for stating defences, and the clerk shall retain the original summons; and in all the future procedure the process shall be given out to the procurators for the defenders respectively, according to their order in the summons, who shall each be allowed to see the same for such time as the Sheriff shall think proper.

32. Upon the day appointed, the defender shall give in all his defences, both dilatory and peremptory.

He shall, in the *first* part of his defences, meet in their order the statements of fact in the summons, by admitting or denying the same, either absolutely or with qualifications, but without argument; and with such explanations

in point of fact, applicable to each averment, as are necessary to make his answers intelligible; and shall also set forth articulately, without argument, the facts on which he may found a separate substantive plea in law; and in the *second* part of his defences he shall subjoin, under distinct heads, a summary of all the defences or pleas in law which he is to maintain, with such argument as he may think fit.

33. Along with his defences, the defender must produce the deeds or writings on which he founds, so far as the same are in his custody or within his power; and if they are not within his custody or power, he shall state where he believes them to be, and crave a diligence for recovering them.

34. In actions of removing, and in summary applications for ejection, the defender shall come prepared with a cautioner for violent profits, at giving in his defences or answers, unless he instantly verify a defence excluding the action.

35. The defences, when given in, shall be seen, and replies lodged, on or before the seventh day thereafter; and if such seventh day be a Court-day, before the sitting of the Court; with power to the Sheriff to appoint a later or an earlier day if he see cause. If, however, the parties are ready to close the record upon the summons and defences alone, or on these papers along with a minute by the pursuer, written on the summons, and simply admitting or denying the statements in the defences, it shall not be necessary to lodge replies, and it shall be competent for the Sheriff to close the record accordingly in manner hereinafter directed.

36. In the *first* part of the replies



the pursuer shall commence by setting forth articulately, and in substantive propositions, without argument, the whole facts on which he founds, which facts must be comprehended under the general statement in the summons; and he shall then meet, in their order, articulately, and without argument, the statements of facts in the defences, by admitting or denying the same, either absolutely, or with qualifications, and with such explanations in point of fact, applicable to each averment, as are necessary to make his answers intelligible; and, in the *second* part of the replies he shall subjoin, under distinct heads, a summary of the pleas in law which he is to maintain, with such argument as he may think fit.

37. When the replies are given in, the Sheriff shall proceed to advise the pleadings; and it shall be in his power, if he see cause, to allow the defences to be amended, in which case he shall particularly specify, in his interlocutor or note, the points on which amendments are required, and such amendments, whether consisting of answers to the pursuer's statements, or to his pleas in law, shall be strictly confined to the points so specified, and shall be made on, or subjoined to, the original defences with reference to their proper heads, and in the same form and manner in all respects as is hereinbefore prescribed for preparing defences.

38. If dilatory defences have been stated, they shall be immediately disposed of by the Sheriff, unless he thinks that, either from their being connected with the merits, or on any other ground, they should be reserved till a future stage of the cause.

39. No reclaiming petitions against any judgment repelling the dilatory defences shall be allowed; but if the judgment has been pronounced by the Sheriff-Substitute, the defender may appeal to the Sheriff.

40. If the Sheriff sustain the dilatory defences, or any of them, he shall at the same time determine the matter of expenses; but if he repel the dilatory defences, the cause shall then proceed in its due course of preparation.

41. If it shall appear to the Sheriff, after the dilatory defences (if any have

been proposed) are disposed of, that the grounds of action on the merits, as set forth in the summons, are in terms not sufficiently positive and clear, or that the conclusions are not regularly or clearly deduced, he may either dismiss the action, decerning for expenses if he shall see cause, and reserving to the pursuer the right to bring a new action, if otherwise competent; or he may allow an amendment of the libel, and give interim decrees against the pursuer for the expenses incurred by the incorrect form of the summons; and the amendments, as approved, shall be written on the original summons, and authenticated by the subscription of the clerk.

42. If the defences or replies be not prepared in the manner hereinbefore directed, the Sheriff may order the same to be withdrawn, and correct defences or replies, as the case may be, to be given in; and he may give interim decrees against the party in fault for the expenses thus occasioned.

43. If it shall appear to the Sheriff that the summons, defences, and replies set forth fully the facts respectively founded on, and sufficiently bring out the merits of the cause, he shall require the parties, within a time to be specified, to state whether they are willing to hold their said pleadings as containing their full and final statement of facts; and if they agree so to do, they shall, within the said time, set forth their assent to that effect in a note subjoined to their respective pleadings, or written on the interlocutor sheet, or minutes of process, and subscribed by them or their respective procurators; and the Sheriff shall then close the record by writing the words "record closed," and dating and subscribing the same.

44. If the parties do not, within the time specified, state whether they are willing to hold their said pleadings as containing their full and final statement of facts, the Sheriff shall be entitled to close the record in the same manner, and to the same effect, as if the parties had expressly agreed.

45. If either of the parties shall state that he does not agree to hold the summons, defences, and replies as sufficiently setting forth the facts respectively

founded on, or if it shall appear to the Sheriff that the record cannot properly be closed without alterations on, or additions to, those pleadings, he shall ordain the parties, or their procurators, to attend him on such day as he shall appoint, for the purpose of adjusting the record, intimating at the same time by a note, or in such manner as he may think proper, the points to which he wishes their attention to be directed. At this meeting, or at any adjournment thereof which the Sheriff may think reasonable, the parties or their procurators may propose any alterations on, or additions to, the defences or replies; which alterations or additions shall be written by them on the original defences or replies, in such mode and form as the Sheriff shall allow. And if the Sheriff shall then be of opinion that the record may be closed, and the parties, or their procurators, are willing to close it, they shall set forth their assent to that effect in a note subjoined to their respective pleadings, or written on the interlocutor sheet, or minutes of process, and subscribed by them or their respective procurators; and the Sheriff shall then close the record by writing the words "record closed," and dating and subscribing the same.

All alterations or additions made on the margin of the record at any period before it is closed shall be authenticated by the initials of the Sheriff.

46. If the parties fail to attend the meeting so appointed, or if any party be absent, and the party present shall consent to close the record, it shall be competent for the Sheriff to do so, in the same manner, and to the same effect, as if both parties had expressly agreed; or otherwise to appoint a new meeting for adjusting and closing the record, with certification.

47. If at the meeting it shall appear to the Sheriff that, from the intricacy of the case, or any other cause, the record cannot properly be closed, or if both parties shall decline to close, the Sheriff shall order a condescendence (from either of the parties) and answers, within such time as he may think proper.

48. If one party shall be willing to close, while the other declines to do so,

the Sheriff shall have power to close the record if he deems it expedient; but in the event of his allowing a condescendence in consequence of such declinature, when he would otherwise think it unnecessary, he shall find the party so declining liable in such part of the previous expenses as he may think reasonable, for which he shall grant interim decree; and he shall then order a condescendence and answers; and it shall not be competent for the clerk to receive the paper of the party who so declined to close until certified that the said expenses have been paid.

49. In the condescendence, the party shall, without argument, in substantive propositions, and under distinct heads or articles, set forth the whole facts and circumstances pertinent to his case, which he avers and offers to prove, and shall state, at the end of each article, the specific mode of proof.

50. In the answers, the respondent shall, articulately and without argument, admit or deny, either absolutely or with qualifications, each separate averment in the condescendence, setting forth in his admission or denial such explanations in point of fact as are necessary to make his answer intelligible. If the respondent, besides his answers to the averments in the condescendence, has to aver any facts or circumstances pertinent to the case on which he founds a separate substantive plea, he shall set them forth without argument, in substantive propositions, and under distinct heads or articles, and shall state at the end of each article the specific mode of proof.

51. The parties shall subjoin to their condescendence or answers a note of the whole pleas in law on which they respectively found. They shall also produce therewith all writings in their custody, or within their power, not already produced, on which they mean to found; but when books of business are founded on, excerpts therefrom may be produced in the first instance, the books themselves being produced in the course of the proof if required. If the writings are not in their custody or power, they shall take a diligence for their recovery, or report any diligence previously granted.

52. If the answers contain a separate statement of facts, the condescender shall be entitled to subjoin to his condescendence articulate answers thereto, with any plea or pleas in law which may thence arise; but otherwise he shall not be entitled to make any alteration on his condescendence until the parties meet before the Sheriff, as hereinafter provided.

53. If the Sheriff think that any of the parties has either stated in the condescendence or answers allegations which ought to have been brought forward in the previous pleadings, or has improperly withheld writings, or other documents, which ought to have been previously produced, he may find the party in fault liable in the whole or such part of the expenses previously incurred by the other party as may appear proper, and give interim decree therefor.

54. As soon as the condescendence and answers, prepared in the manner before directed, are lodged, the Sheriff shall order the parties, or their procurators, to attend him on such day as he shall appoint, for the purpose of adjusting and closing the record; intimating, if necessary, at the same time, by a note, or in such manner as he may think proper, the points to which he wishes their attention to be directed. At this meeting the parties or their procurators may propose any alterations on, or additions to, the condescendence and answers; which alterations or additions shall be written by them on the original condescendence and answers, in such mode and form as the Sheriff shall allow; after which, or if the parties or any of them be absent, it shall be competent for the Sheriff to close the record, whether the parties are willing or not, by writing the words "record closed," and dating and subscribing the same; and all alterations or additions made on the margin of the record before closing shall be authenticated as hereinbefore directed.

55. If in the summons, defences, and replies, or in the condescendence and answers, a statement of fact within the opposite party's knowledge be averred by one party and not denied by the other, the latter shall be held as confessed.

56. When the record has been closed in any of the modes above mentioned, no new averments of fact, amendment of the libel, or new ground of defence, or productions within the power of the party, shall be allowed or received, under the exception of *res noviter veniens ad notitiam*, or of facts emerging since the record was closed.

57. When the Sheriff shall see cause, he may order written pleadings on the relevancy of the allegations on the record.

58. It shall be competent to either party, before final judgment in a cause, to apply either by motion in Court, or by a short note without argument, for leave to lodge a statement of any matter of fact or document *noviter veniens ad notitiam*, or emerging since the record was closed. The Sheriff shall thereupon appoint the said party, within a time to be specified, to give in a condescendence, stating, in the first place, the facts which he alleges to have newly come to his knowledge, or to have emerged since the record was closed; and, secondly and *separatim*, setting forth the circumstances under which they have only recently come to his knowledge or emerged; and shall, if he see cause, appoint the other party, within a specified time, to answer the latter part of the said condescendence: And upon the said answers being given in, the Sheriff shall, either upon proof or otherwise, determine whether or not the said matter, as *res noviter veniens ad notitiam*, or as having emerged since the record was closed, ought to be added to the record, and shall pronounce an interlocutor accordingly, at the same time determining, or specially reserving, the point of expenses. And in case he shall be of opinion that the said facts ought to be added to the record, he shall appoint the opposite party to answer the first part of the said condescendence; and the Sheriff shall thereafter of new close the record upon these additional papers.

59. The Sheriff shall, by a special order, fix the time within which each paper shall be lodged, except in so far as hereinbefore or after provided; and the clerk shall not receive them after the time so fixed except by consent of

the opposite agent, written thereon and subscribed by him. Nor shall the time for so lodging papers be in any case prorogated except by the Sheriff, on cause shown, and on payment of an amand, or of the whole or part of the expenses previously incurred, if the Sheriff shall think proper. If the party shall fail to lodge any paper ordered within the time originally fixed, or afterwards prorogated, the Sheriff may close the record, and either give judgment, allow a proof, or otherwise dispose of the cause as he shall think fit.

60. When it shall appear to the Sheriff that all the facts requisite to the decision of the cause are ascertained so as to render any proof unnecessary, he may proceed to decide the cause without further argument, or he may order memorials, or minutes of debate, if he see cause.

61. It shall be competent to the pursuer, before any interlocutor of absolvitor is pronounced, to enter on the record an abandonment of the cause, on paying full expenses to the defender, and to bring a new action, if otherwise competent.

62. In pronouncing judgment on the merits, the Sheriff shall also determine the matter of expenses, in so far as not already settled.

63. All pleadings shall be subscribed by the party himself (he being answerable as to their being in regular form, and containing nothing improper or disrespectful to the Court), or by a procurator of Court, or other person legally authorised to act; and shall state the name and designation of the person by whom they are drawn, otherwise they shall not be received.

64. No petition, memorial, minute, note, protest, or written pleading, other than those which are expressly allowed by the present regulations, shall, without previous permission by the Sheriff, be received by the clerk.

65. It shall be the duty of the Sheriff to enforce, in the strictest manner, the present regulations, by ordering peremptorily all such pleadings as are not in terms thereof to be withdrawn, and also, if necessary, by imposing amands, or awarding to the opposite party expenses, to such an extent as may seem expedient and proper.

#### Chap. VIII.—*Appointments on Parties to Confess or Deny, and Judicial Examination of Parties.*

66. When the record shall have been closed, or at such earlier stage of the cause as to the Sheriff shall seem proper, he may order both parties, or either of them, between and a certain day, by a writing under their hands, to confess or deny facts specified by the Sheriff, or to attend personally for examination, and answer such interrogatories as the Sheriff or commissioner shall think proper; and if the party fail to comply with such order within the

time assigned, he shall be held as confessed to such extent as the Sheriff shall think just, and decree may thereupon be pronounced, reserving to the Sheriff to repon him upon cause shown, and on payment of such amand or expenses as the Sheriff may think proper.

67. All such examinations shall take place in presence of the Sheriff; but when he cannot attend, or in cases of special emergency, he may appoint a commissioner.

#### Chap. IX.—*Proof and Circumduction.*

68. If the facts are not sufficiently ascertained, the Sheriff shall allow a proof of such facts averred in the record as he may deem necessary; and it shall be the duty of the Sheriff or his substitute to take the proof; but when this cannot be done without interfering with more important duties, which cannot be

delegated, a remit may be made to a commissioner.

69. When the Sheriff considers it necessary to grant act and commission, the clerk shall only extract so much of the process as relates to the points on which the proof is to be taken; but it shall not be necessary to take out such

extract if the proof is to be taken within the county. The commissioner, if the proof is to be taken within Scotland, shall either be the Clerk of Court, his acting depute, a practitioner before any Court of law of at least three years' standing, a justice of the peace, or other magistrate.

70. If the mean of proof be by writings alleged to be in the other party's hands, a day shall be assigned to that party for producing them, or to depone thereanent, as in an exhibition; or a diligence may be granted against him as a haver; and in case he shall fail to exhibit or depone on the day appointed, he shall be held as confessed upon the point offered to be proved by such writings.

71. When the mean of proof is by writings not in the party's hands, or by witnesses, a day shall be assigned for recovery of such writs, or for proving by witnesses, and diligence shall be granted to that effect, to be reported against the day assigned. (*Vide infra*, § 126, as to cases where the claim exceeds £40.)

72. Witnesses and havers residing in another sheriffdom must be cited in the terms and under the provisions of 1 & 2 Vict. c. 119, § 24.

73. The evidence of any witness about to leave Scotland, or whose testimony is in danger of being lost on account of extreme old age or dangerous sickness, may, upon application in a depending process, be taken to lie *in retentis*. The party, if required by the Sheriff, must instruct the fact alleged as the cause of the application. In case of old age, a certificate to that purpose must in general be exhibited; and in case of sickness, the certificate of a physician or surgeon, or of the minister of the parish, must always be produced. If such proof is applied for before the record is closed, the party shall specify in the application the fact or facts on which the witnesses are to be examined.

74. It shall be in the power of the Sheriff or commissioner taking the proof to order to witnesses such expenses as shall seem just, to be paid by the party adducing them or his procurator. The dues of oaths must be paid by the party requiring them.

75. If havers or witnesses within the

county, who have been cited on *inducias* of not less than forty-eight hours, do not appear upon the day to which they are cited, and if no satisfactory reason be assigned for their non-attendance, second diligence shall be granted at the party's instance for apprehending and imprisoning them, until they find caution, under such penalty as may be fixed by the Sheriff, to appear at the subsequent diets of proof when required; and which diligence shall always be reported on the day assigned for that purpose, either along with the witnesses, or with an execution by an officer, bearing that they have been searched for and could not be found. The Sheriff, when taking a proof himself, or on report of the commissioner, shall decide whether witnesses not appearing on the day to which they were first cited should be entitled to expenses, or should be liable in the expense of second diligence, and execution thereof, or fined for their contumacy. (See on this subject, 1 & 2 Vict. c. 119, § 24.)

76. Before proceeding in any proof, the diet for which has been fixed in absence of either party or his procurator, it must, if required, be shown to the Sheriff or commissioner taking the proof that notice of the appointment to prove has been made to that party or his procurator in terms of the interlocutor allowing the proof; and the Sheriff or commissioner in taking a proof or declaration, or an oath of party on reference may, notwithstanding the absence of one of the parties or his procurator, proceed with the proof.

77. Such incidental debates as arise during the examination of a party, or in the course of a proof, shall be considered as closed by a short written statement of the grounds of objection, with answers thereto, unless otherwise appointed by the Sheriff; and these objections and answers, as also any further debate thus allowed, shall be taken down on separate papers referred to, and not engrossed in the proof, unless otherwise ordered by the Sheriff or commissioners. No reclaiming petition shall be competent against any judgment pronounced in the course of taking a proof; but all such judgments shall be subject to review by appeal to

the Sheriff-Substitute or Sheriff without prejudice to the right of further appeal from the judgment of the Sheriff-Substitute to the Sheriff, as in other cases. When the Sheriff or commissioner repels an objection to a witness or to an interrogatory, it shall be his duty to proceed with the examination, and in all other cases it shall be competent to him to do so; and he shall have power in any case to order the proof, subject to such objection, to be sealed up if he shall see cause. All questions arising in the course of a proof may be disposed of in time of vacation.

78. When a witness is brought forward by one party, he shall be subject, at the same diet, to examination in chief by the adverse party, and to cross-examination by both parties, the adverse party paying his proportion of the expense of such examination.

79. When the proof is by oath of party, a day shall be assigned for his appearing and deponing. Such oath shall be taken by the Sheriff, but if he cannot attend, or in any case of special emergency, he may appoint a commissioner. If the party fail to appear upon the day assigned, and if no satisfactory reason be given for his absence, and the Sheriff do not see cause to prorogate the diet, the term shall be circumduced against him, and he shall be held as confessed, and either debarred against or avizandum made with the cause, as the nature of the case may require.

80. When any fact has been referred to oath of party, if, before emitting the oath, another mean of proof be demanded, it shall not be allowed, except upon the person who made the reference previously paying the expense which the other party has been put to by this change of procedure, as the same shall be modified by the Sheriff.

81. Upon the day assigned for reporting the diligence of commission, the party who obtained it shall report the same. If he do not, the other party may crave circumduction; and the term shall be circumduced unless sufficient cause for not reporting be shown to the Sheriff, who may prorogate the term, upon payment of part of the

expenses, or without any such condition, as he may think proper. When a cause is at proof on commission, it shall not be put to the roll until the term for proving is expired, unless, from circumstances occurring in the course of the proof, it becomes necessary to enrol the cause to have the Sheriff's directions thereanent.

82. No party shall be reponed against a circumduction, or against a holding as confessed, except upon cause shown to excuse his former failure, and upon payment of such sum as the Sheriff shall modify for indemnifying the other party.

83. When a proof is reported and an interlocutor pronounced thereon, no further proof shall be allowed, except upon very weighty reasons shown, and upon payment to the other party of such a sum for expenses as the Sheriff shall determine. When such further proof is applied for, the facts, and the witnesses by whom they are to be proved, must be particularly condescended on in the petition craving the additional proof.

84. In all cases where the oath of party is required, the party by whom the reference or deference is made must either subscribe, along with his procurator, the paper in which the requisition is made, or sign a separate writing to that effect, to be produced along with the paper, or judicially adhere to the reference or deference in presence of the Sheriff, or of the commissioner.

85. When proof, either by oath of party or by witnesses, is concluded and reported, the Sheriff shall proceed to advise the cause, unless he shall deem it necessary, either from the intricacy of the proof or the importance of the cause, to appoint memorials or minutes of debate upon the proof, or upon the whole cause.

86. These memorials or minutes shall not contain any quotation from the proof, or any of the writings in process, except when absolutely necessary; but reference may be made to the parole proof by the page, and by the letters of the alphabet (which for that purpose shall be put on the margin of the proof), and to the written evidence by the pages.

Chap. X.—*Of Statements of Accounts, and Reports on Remits.*

87. It shall be competent to the Sheriff, when he sees cause, to order either or both parties to give in full and complete statements of accounts, and thereupon to order objections and answers, and afterwards he may allow the parties to revise those papers by making alterations or additions on them in such mode or form as he shall direct; which alterations or additions shall be such only as are rendered necessary by new statements or arguments in the paper of the opposite party.

88. When the Sheriff sees cause, he may, either before or after the record is closed, appoint visitations and inspections, or remit to accountants, auditors, inspectors, or other persons of skill, to report, and to prepare and lodge plans,

where necessary; and the reporters may afterwards be required to verify the reports upon oath.

89. The Sheriff may allow objections to, or observations on, the report and answers, and thereafter may allow these papers to be revised, under the provisions contained in section 87.

90. The expense of these remits and reports shall, in the first instance, be paid by the parties' procurators jointly, unless the Sheriff shall in particular cases see reason to order otherwise. But the expense of accountants' reports shall not be chargeable against the agent unless so arranged. The fees of auditing shall in the first instance be paid by the party whose account is taxed.

Chap. XI.—*Improbation of Writs and Executions.*

91. Improbation against executions of process, or against any writs founded on by either party, shall not be received unless proposed by the party who makes the challenge, or by his procurator specially authorised for that purpose by a written mandate, and upon consignment of a sum not exceeding five pounds, nor under ten shillings, as the

Sheriff shall modify to be forfeited to the other party in case the proponent shall afterwards pass from or fail in his improbation, besides being liable in the expenses and damages which shall be awarded against him at the conclusion of the cause, and other legal consequences of failing in the improbation.

Chap. XII.—*Oath of Calumny.*

92. If at any time the oath of calumny be insisted for when the party from whom it is demanded is not present, it shall not be allowed unless upon consignment of a sum not exceeding forty shillings, nor under five shillings, to be fixed by the Sheriff, and, if he see cause, to be forfeited

to the other party in case the oath is afterwards passed from, or is negative, besides payment of what shall be awarded by the Sheriff as travelling charges, and other expenses, occasioned by the oath of calumny being insisted on.

Chap. XIII.—*Reclaiming Petitions.*

93. Every reclaiming petition must recite *verbatim* the interlocutor reclaimed against, and bear upon the margin the true date of that interlocutor, and must be drawn in the terms specified in Chap. IX., sect. 86.

94. In all cases, the interlocutor pronounced on advising a reclaiming petition, whether agreeing with or varying from the interlocutor reclaimed against,

shall be final, without prejudice to either party craving the judgment of the Sheriff by appeal.

95. Reclaiming petitions, in ordinary actions, shall be lodged with the clerk, and marked on the back by him on or before the fourteenth day after the date of the interlocutor, excepting in actions of removing and aliment, in which actions reclaiming petitions must be

lodged on or before the seventh day after the date of the interlocutor. The clerk is enjoined not to receive any petition after the expiry of those days respectively. Answers to reclaiming petitions, if ordered, must be lodged within the same number of days as the petitions respectively, unless otherwise ordered by the Sheriff.

96. When any party desirous of reclaiming against an interlocutor is prevented by another party having borrowed the process, it shall be com-

petent for him, within the reclaiming days, to present a *pro forma* petition, praying for leave to lodge an additional petition; and upon a certificate thereon, subscribed by the clerk, that the petitioner has been thus prevented, the Sheriff may, if he see cause, allow such additional petition to be lodged within such period as he may think proper.

97. No new production shall be received, either with a reclaiming petition or the answers.

#### Chap. XIV.—*Appeal to the Sheriff.*

98. Parties thinking themselves aggrieved by any judgment of the Sheriff-Substitute, whether interlocutory or final, except in the cases otherwise provided, may, on or before the seventh day after the date of the interlocutor, apply for the opinion of the Sheriff by appeal. But when the decree may be extracted in a shorter time, the appeal must be made within the days of extract. The appeal must be made by a motion in Court, or by a minute without argument, referring by date to the interlocutor appealed from, and craving the opinion of the Sheriff on the whole or any part of such interlocutor. It

shall be competent to the Sheriff-Substitute to refuse to allow the appeal against any interlocutor which, in his opinion, ought to be carried into immediate effect.

99. It shall be competent for the Sheriff, when the case is before him on appeal on any point, to open up the record *ex proprio motu*, if it shall appear to him not to have been properly made up.

100. No reclaiming petition against the judgment of the Sheriff pronounced on appeal shall be competent, whether such judgment affirm or alter the judgment of the Sheriff-Substitute.

#### Chap. XV.—*Of Actions of Wakening.*

101. When a process is allowed to lie over for a year and day, the party desirous to awaken and insist in it must raise a summons of wakening in the

usual form, unless both parties or their procurators agree, by a written consent, to the cause being wakened.

#### Chap. XVI.—*Multiplepoundings.*

102. When a multiplepounding is raised in the name of the holder of a fund by one of the claimants, it shall be served on the nominal pursuer as well as upon the other claimants, and an execution of such service shall be returned along with the executions of citation.

103. When the person possessed of the fund *in medio* is the real pursuer, he shall state in his summons, or in a precise and articulate condescendence to be lodged at the calling, the amount and particulars thereof, and also any claim or lien which he may think he has thereon; and when he is only the

nominal pursuer, he shall, either at the first calling of the cause or on or before the seventh day thereafter, and if such seventh day be a Court-day, before the meeting of the Court, give in such a condescendence, or lodge objections as his defences against the summons served as a claim upon him, otherwise he shall be held as confessed; or a condescendence of the fund *in medio* may be ordered from any of the claimants.

104. The claimants in a multiplepounding shall state their respective claims in the form of condescendences, with the conclusions to be drawn from the facts so stated in the shape of notes



of pleas, producing therewith their grounds of debt and other writings for instructing their claims; and it shall be competent to the Sheriff, if he see cause, to appoint the creditors to meet and choose a common agent, who shall prepare and lodge a state of the claims and preferences, putting his objections as therein stated to each or any of the claims in the form of answers to a condescendence, with note of pleas: and, *quoad ultra*, the duty and nature of his office shall be similar to that of a common agent in a process of ranking and division in the Court of Session;

and if no common agent shall be appointed, the parties shall be required to revise their condescendences, each being allowed to state, in a note annexed to his condescendence, his objections to any other claim or claims, in the form of answers to a condescendence, with a note of pleas; and the Sheriff, if he see cause, may order these several papers to be revised, and the case shall be proceeded with in a manner as nearly as possible approaching to that hereinbefore shown in regard to ordinary actions.

#### Chap. XVII.—*Expenses.*

105. The sum of expenses to be given in any decree, whether in absence or *in foro*, shall always be taxed before extract.

106. In all cases where a decree is given for expenses, the Sheriff, if he see cause, may, upon the application of the procurator who conducted the suit, allow the decree for expenses to go out and be extracted in the name of such procurator.

107. Although a party has been found entitled to expenses generally, he shall not be allowed to include in his account the expense of any particular part or branch of the litigation in which he has been unsuccessful, or which has been occasioned by his own fault.

108. Where expenses have been

imposed on any party by an interlocutor pronounced during the progress of the cause, no claim for repetition thereof shall be competent at the end of the cause.

109. It shall be competent for either party, within forty-eight hours after an account has been taxed, to lodge a note of specific objections to such taxation, which the Sheriff shall dispose of, with or without answers, as he shall see cause. No reclaiming petition shall be competent against any interlocutor regarding the taxation or modification of accounts of expenses; nor shall any appeal be competent against any such interlocutor unless lodged within forty-eight hours from its date.

#### Chap. XVII., Sec. II.—*Taxation of Procurator's Accounts.*

110. In order to provide an easy method by which the accounts of practitioners, as between agent and client, may be checked and liquidated, it shall be competent either to the client or to the agent to present a summary application to the Sheriff before whom any cause may depend, or may have depended, to get the account claimed by the agent audited and taxed; such application shall be served on the party, and on its being produced in Court, with a service of intimation of at least seven days, it shall be forthwith granted; and the said account shall thereupon be audited and taxed, and the parties shall have it in their power to state objections

to the report, all in manner before provided.

111. The sum so ascertained as the amount of the account shall form the only charge against the client, and a precept or decree, on a charge of fifteen days, may issue therefor: Provided always that the judgment of the Sheriff shall be liable to review in common form.

112. The said application may be presented either during the dependence of a process, or after it is out of Court by an extracted decree; but it shall not be competent where liability for payment of the account is disputed by the client, in which case the agent shall be bound to proceed by an ordinary action.

Chap. XVIII.—*Extracting the Decree, and Reponing against Decrees in Absence.*

113. Decrees may be extracted after the expiry of six free days from the day when the interlocutor is pronounced on the merits (forty-eight hours having also expired after the modification of expenses in litigated causes), except in those cases where extract shall be superseded by the Sheriff, or where he shall find it expedient to allow extract immediately, or within a shorter time than six free days. But decrees of removing, other than those obtained under the provisions of 1 & 2 Vict. c. 119, §§ 8 to 13, may be extracted forty-eight hours after the interlocutor is signed.

114. When a party shall intimate in writing to the Clerk of Court that he intends to advocate the cause, and shall therewith lodge a bond of caution for such expenses as have been incurred in the Sheriff Court, and as may be incurred in the Court of Session, fifteen days in the ordinary cases, and thirty days in causes before the Courts of Orkney and Shetland, shall be allowed, after final judgment, to apply by note of advocacy to the Court of Session before extract shall be competent; but on the elapse of the foresaid terms respectively, if no note of advocacy shall have been intimated to the Clerk of Court, he may give out the extract on the application of either party; it being competent, however, to intimate a sist or note of advocacy at any time before the decree has been actually extracted.

115. Where decree in absence in any civil cause shall have been pronounced or extracted in any Sheriff Court other than in causes in the Small Debt Court, or in processes of removing raised under authority of the Act 1 & 2 Vict. c. 119 (§ 18), a petition may be presented to the Sheriff Court in which such decree was pronounced to be reponed against the said decree and any letters of horning or charge following thereon, where the same shall not have been implemented in whole or in part, and on consignment in the hands of the Clerk of Court of the expenses incurred, as the same may be modified on taxation, the Sheriff shall repon the defender, and revive the action or proceeding in which such decree had been pronounced, as if decree had not been pronounced or extracted, and shall have power to award to the pursuer such part of the expenses consigned as he may judge reasonable; and the Sheriff shall pronounce such order for intimation to and for appearance of the opposite party as may be just; and such order may be executed against a person in any other county as well as in the county where such order is issued, the same being previously endorsed by the Sheriff-Clerk of such other county, who is hereby required to make and date such indorsement; and such order being so made and executed, all further orders and interlocutors in the cause shall be sufficient and effectual, and the cause shall be proceeded with in common form.

Chap. XIX.—*Suspensions in Sheriff Courts.*

116. Where a charge shall be given on a degree of registration proceeding on a bond, bill, contract, or other form of obligation, registered in any Sheriff Court books, or in the books of Council and Session, or any others competent, or on letters of horning following on such decree, for payment of any sum of money not exceeding the sum of twenty-five pounds of principal, exclusive of interest and expenses (1 & 2 Vict. c. 119, § 19), any person so charged may apply by petition to the

Sheriff Court of his domicile for suspension of said charge and diligence, on caution; and on sufficient caution being found in the hands of the Clerk of Court for the sum charged for, and interest and expenses to be incurred in the Sheriff Court, the Sheriff shall have power to sist execution against the petitioner, and to order intimation of the petition of suspension, and answers to be given in thereto, and thereafter to proceed with the further disposal and decision of the cause, in like manner as

in summary causes in such Court, and to suspend the charge and diligence so far as regards the petitioner; provided that the said order for intimation and answers as aforesaid may be made and carried into execution against any person in any other county as well as in the county where such order is issued, in manner and to the effect hereinbefore provided. (*Vide* § 16.)

117. If any petition of suspension as aforesaid shall be presented in any Sheriff Court, and a preliminary objection be made to the competency of such

petition, or to the regularity thereof (1 & 2 Vict. c. 119, § 20), an appeal against the judgment of the Sheriff-Substitute repelling or sustaining such objection may be taken in common form to the Sheriff, whose judgment thereon shall be final, and not subject to review either in the Circuit Court of Justiciary or in the Court of Session.

118. No reclaiming petition shall be competent against the judgment of the Sheriff-Substitute disposing of such objections.

#### Chap. XX.—*Advocations, Suspensions in the Court of Session, and Sists.*

119. Any party who has given notice of his intention to advocate, and has lodged his bond of caution in terms of § 114, may be allowed to see the process until it is competent to extract the decree.

120. The leave of the Sheriff when required before advocating interlocutory sentences to the Court of Session, in terms of the Act 50 Geo. III. c. 112, § 37, must be obtained upon an application by petition. This petition must not contain any argument, but shall merely narrate the interlocutors to be advocated.

121. Where a person wishes to bring under review of the Court of Session any final judgment of a Sheriff, upon finding juratory caution only for expenses, he shall apply by petition to the Sheriff, praying that such caution may be received, which application shall be intimated to the opposite party or his agent.

122. Before any such application shall be granted, the complainer shall be required to depone at a time and place to be previously intimated to the opposite party or his agent, in order that they may have an opportunity of cross-interrogating him, if they see fit, whether he have any lands in property or liferent, or bonds, bills, or contracts containing sums of money; and in case he acknowledge the same, he shall condescend thereon, and depone that he has no other lands, bonds, bills, or contracts containing sums of money belonging to him.

123. The complainer shall also lodge

with the Sheriff-Clerk—1. The bond of caution. 2. A full inventory of his subjects and effects of every kind. 3. An enactment subjoined to the inventory, bearing that he will not dilapidate any of his property, and that he will not dispose of the same or uplift any of the debts due to him without consent of the respondent or his agent, or the authority of the Sheriff (under pain of imprisonment, or being otherwise punished as being guilty of fraud), till the advocacy be discussed, and till there be an opportunity of doing diligence for any expenses that may ultimately be found due by him.

124. Further, the complainer shall lodge in the hands of the said clerk the vouchers of any debts due to him, and the title-deeds of any heritable subject belonging to him, so far as the same may be in his possession or within his power; and the complainer shall also grant a special disposition to the respondent (if so required) of any heritable subject he may be possessed of, and an assignation of all debts or other rights due to him for the respondent's further security; the said disposition and assignation to be made out at the expense of the respondent, and by his agent; and the same, with the said vouchers and title-deeds, if so deposited, to remain in the hands of the said clerk, subject to the directions of the Sheriff, till the advocacy be discussed.

125. Upon all this being done to the satisfaction of the Sheriff, he shall grant leave to advocate on juratory caution and the Sheriff-Clerk shall certify the same.

126. In all causes originating in the Sheriff Court, in which the claim is in amount above £40, when an interlocutor is pronounced allowing a proof (unless an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall not be competent to either of the parties to take any proof, except one allowed to lie *in retentis*, until after the expiry of fifteen free days in the ordinary case, and thirty days in cases before the Courts of Orkney and Shetland in order to give time for an advocacy, in terms of the statute 6 Geo. IV. c. 120, § 40; and unless the passing of a note of advocacy shall be duly intimated within the said periods of fifteen and thirty days respectively, the proof shall proceed; provided always, that by agreement of parties the proof may be taken without such delay.

127. When the certified notice of a note of advocacy, under the hand of the depute or assistant clerk of Session, required by the Act 1 & 2 Vict. c. 86, § 1, has been received by the Sheriff-Clerk, he shall mark the said notice, and furnish a certificate to the party producing the same, and all further proceedings in the Sheriff Court shall then cease.

128. The said note of advocacy and notice shall immediately be intimated to the adverse party by delivering to him, or his procurator, a copy of the same; and a certificate of intimation shall be indorsed on the said note by the advocator's agent. The process shall then be produced by the procurator whose receipt stands for it, in order that it may be transmitted by the clerk

agreeably to the Act of Parliament 1 & 2 Vict. c. 86, § 1, and the A. S. 17th January, 1797 (*Note*.—"In a sealed cover, with a full inventory thereof signed by him"), and minuted as having been sent; and failing his producing the process, the Sheriff may grant caption for recovering it, and enforce such fine for non-compliance with this regulation, as to the Sheriff shall seem reasonable.

129. If a remit on a note of suspension of a decree in absence be pronounced in terms of the Act of Sederunt, 11th August, 1787, the charger's procurator shall be allowed to see the note, and remit thereon, and shall, within six days, return the same to the Clerk of Court, with an account of the expense incurred in the first process, decree, and charge thereon, and also the expense incurred in the Bill Chamber. These expenses shall be taxed and modified, and an order made on the suspender to pay or consign the same within eight days; and against this order no reclaiming petition or appeal shall be allowed. If the sum modified be not paid or consigned in eight days, the process shall be transmitted to the Sheriff, who may allow the diligence to be put to further execution; and no petition shall be received against this last judgment unless the petitioner consign with the petition the modified expenses.

130. In all advocations of interlocutors pronounced by Sheriffs, it shall be competent for the Sheriff to regulate, in the meantime, on the application of either party, all matters respecting interim possession, having due regard to the manner in which the interests of the parties may be affected in the final decision of the cause.

#### Chap. XXI.—*Appeals to the Circuit Court of Justiciary.*

131. In civil causes appeals to the next Circuit Court, in terms of the Acts 20 Geo. II. c. 43; 31 Geo. II. c. 42; and 54 Geo. III. c. 67, are competent only after a final judgment has been pronounced, and the matter of expenses has been disposed of, and

where the subject-matter in the suit does not exceed in value £25 sterling.

132. The appeal may be taken in open Court at the time of pronouncing the judgment, or within ten days thereafter, by both lodging the appeal in the clerk's hands and serving the

other party, or his procurator in the cause, with a copy thereof; and both the lodging and service must take place not only within ten days after the date of the judgment, but also fifteen days at least before the diet of the Circuit Court.

133. At the time of entering the appeal, or within the said ten days,

the complainer must lodge in the hands of the clerk a bond, with a sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and if no bond has been lodged, the clerk may give out the extract.

#### Chap. XXII.—*The Poor's Roll.*

134. As parties, from poverty, are sometimes unable to pursue or defend any civil or criminal action, the procurators of Court shall annually appoint one or more of their number to act as procurators for the poor *gratis*, such appointment to be approved of by the Sheriff.

135. Application for the benefit of the poor's roll shall be made by petition, along with which there shall be produced a certificate, signed by the minister of the parish, or by the heritor on whose lands the pauper resides, or by two elders, bearing that it consists with their personal knowledge that the person prosecuted, or who means to bring the action is not possessed of funds for paying the expense thereof. This petition shall be remitted to the procurators for the poor, who shall intimate the petition to the other party; and after hearing both parties, or inquiring into the case, report

their opinion specially to the Sheriff, whether the petitioner has a *probabilis causa litigandi*. On considering which report, the Sheriff shall either refuse the petition, or remit to one of the procurators for the poor, who shall attend to and conduct the cause to its final issue, though he cease to be one of the agents for the poor; and the pauper shall not be liable in payment of any of the dues of the Court, or fees to the procurator, or to the officer, except actual outlay, unless expenses shall be awarded and recovered in the process. No person except the procurators for the poor shall conduct any such case. It shall be in the power of the Sheriff, at any time when he sees cause, to deprive a party of the benefit of the poor's roll.

136. It shall be in the power of the Sheriff, on cause shown, to relieve the procurator for the poor from paying the expenses of witnesses.

### PART II.—OF SUMMARY APPLICATIONS, ARRESTMENTS, &c.

#### Chap. I.—*Summary Applications, how and in what Cases to be Allowed.*

137. In all cases which require extraordinary dispatch, and where the interest of the party might suffer by abiding the ordinary *induciae*, application by summary petition may be made to the Sheriff, who, on considering the petition, may, if he see cause, order it to be served on the person complained of, and to be answered within such *induciae* as the Sheriff in each case may think proper. And the procedure in such cases shall not abide the ordinary course of the Court-days, it being always competent to pronounce such interim order as the exigencies of the case require.

138. It shall be no objection to such

application that it contains a conclusion for a claim of damage or other claim arising out of the subject-matter thereof; and it shall be competent for the Sheriff to decern for such claim as in an ordinary action.

139. The officer serving and intimating such petition shall give to the defender, or leave for him at his dwelling-place, in presence of one witness, a full copy of the petition and deliverance, with a citation and requisition, and return an execution subscribed by himself and the witness.

140. The petition must be prepared in all respects in terms of section 10;

and the prayer thereof must set forth specifically and in explicit terms the remedy craved. The answers must be prepared in terms of sections 32 and 33.

141. If answers are not lodged within the time appointed, the clerk, on production of the warrant and a regular execution, shall certify that answers are not lodged, and thereon the Sheriff shall grant the desire of the petition, or pronounce such other judgment as he shall see fit.

142. When answers have been lodged, the process shall be given out to the pursuer, to reply within such number of days as were allowed for answering, unless the Sheriff see cause to fix an earlier or later day. The replies must be prepared in terms of section 37.

143. In cases where the defender has lodged answers by the time appointed, but the petitioner has either failed to report the warrant and execution or to reply within the time allowed, the process may be forced back by a caption, in order that the case may be laid before the Sheriff; or, in the respondent's option, pro-

testation may be granted, and the petition be dismissed with expenses.

144. Reclaiming petitions must be lodged on or before the seventh day after the date of the interlocutor; and the clerk is enjoined not to receive any petition after that day; and answers to reclaiming petitions, if ordered, must be lodged within the same number of days, unless otherwise ordered by the Sheriff.

145. Summary cases shall proceed and be conducted in terms of the regulations, and subject to the compulsitors provided in the case of ordinary actions in all particulars, except as above specified.

146. Decrees in summary cases may be extracted in terms of sections 113 and 114; but warrants to roup, and other such warrants requiring speedy execution, may be extracted immediately after being pronounced, unless otherwise ordered by the Sheriff, or unless due intimation has been given of the intention to reclaim or advocate; it being competent to the Sheriff to regulate, in the meantime, on the application of either party, all matters regarding interim possession, as in section 130.

#### Chap. II.—*Actions of Removing and of Aliment.*

147. Actions of removing and of aliment, brought in the form of a summons, are to be entitled to the privileges of summary processes in every respect. See other regulations as to these cases in sections 34, 95, 113.

148. For regulations regarding removing from premises let for less than

a year, and at rents not exceeding the rate of £30 a-year, see 1 & 2 Vict. c. 119, §§ 8 to 14.

149. No appeal to the Sheriff shall be competent against judgments of the Sheriff-Substitute in cases of summary removing under the said Act, except when they have been remitted to the ordinary roll.

#### Chap. III.—*Sequestration for Rent.*

150. When a petition for sequestration is presented, the Sheriff may pronounce an interlocutor sequestrating the crop, stocking, and effects, and grant warrant to take an inventory thereof, and ordain the petition and warrant to be served on the tenant, and him to give in answers thereto within such *induciae* as to the Sheriff shall seem proper. If no answers are lodged within the time assigned, the Sheriff, on production of the executions

of sequestration and service of the petition on the defender, may grant warrant of sale. Every warrant to sell sequestered effects shall be carried into execution at the sight of the Clerk of Court, or other person authorised by the Sheriff; and in every case where a sale follows on such warrant, the sale shall be reported within fourteen days after the date of the roup; and the principal roup-rolls, or copies regularly certified, must, within the same period,

be lodged in process, together with an account of the expenses incurred in the sequestration and sale, and also a state of the debt by the defender, showing the difference between the debt and the proceeds of the effects sold.

151. In petitions for sequestration it shall be competent to conclude for payment of the rent, and decree may thereupon be pronounced for the same and expenses, or for such balance as

may remain due after sequestration and sale, and under deduction of the expenses thereof, under the provisions of the foregoing section.

152. It shall be competent to the Sheriff, on cause shown, at any stage of the proceedings, to appoint a fit person to take charge of the sequestrated subjects, or to require caution from the tenant that they shall be afterwards made forthcoming.

#### Chap. IV.—*Arrestments.*

153. The clerk is authorised to issue precepts of arrestment, upon there being produced to him a libelled summons not containing a warrant of arrestment, or a petition with pecuniary conclusions. The precept shall always set forth the ground of application for the arrestment; and no blank warrant of arrestment shall be granted upon any pretence whatever.

154. If the pursuer shall use arrestment on a libelled summons (1 & 2 Vict. c. 114, § 17), the same shall be effectual, provided the warrant of citation shall be executed against the defender within twenty days after the date of the execution of the arrestment, and the summons be called in Court within twenty days after the diet of comparance, or, when the expiry of the said period of twenty days falls within the vacation, provided the summons be called on the first Court-day thereafter, whether such Court-

day be one of those hereby authorised to be held in vacation (§ 3), or in the ensuing session; and if the warrant of citation shall not be executed, and the summons called in manner above directed, the arrestment shall be null, without prejudice to the validity of any subsequent arrestment duly executed in virtue of the said warrant.

155. Any warrant or precept of arrestment granted by any Sheriff, whether contained in a libelled summons, or proceeding upon a depending action or liquid document of debt (1 & 2 Vict. c. 114, § 19), may lawfully be executed within the territory of any other Sheriff, the same being first indorsed by the Sheriff-Clerk of such sheriffdom, who is required to make and date such indorsation.

156. For regulations regarding the recal or restriction of arrestments by the Sheriff, see 1 & 2 Vict. c. 114, § 21.

#### Chap. V.—*Members of Court.*

157. No person shall be permitted to practise as a procurator in any Sheriff Court unless he be a Writer to the Signet or a Solicitor before the Supreme Courts, or have been admitted a procurator, and have practised as such before some Sheriff Court, or have served three years as an apprentice to a Writer to the Signet, to a Solicitor before the Supreme Courts, or to a procurator before any Sheriff Court in Scotland, or Court of royal burgh, or to a Sheriff-Clerk, be twenty-one years of age, and be regularly admitted by the

Sheriff without prejudice to the legal rights of chartered bodies.

158. Any agent in the Court of Session proposing to practise before a Sheriff Court in applications for the benefit of *cessio* in terms of 6 & 7 Will. IV. c. 56, or in any proceeding not competent in a Sheriff Court before the passing of the 1 & 2 Vict. c. 119, shall produce to the Clerk of Court sufficient evidence of his being duly qualified to practise as an agent before the Court of Session.

159. Procurators of Court and agents qualified as above, and resident within

the jurisdiction of the Court shall alone be entitled to borrow any process, by themselves, or their clerks duly authorised, and for whom they shall be respon-

sible by the ordinary compulsitors of the law.

160. The Sheriff-Clerk or his depute, shall not act, either directly or indirectly, as a procurator.

### PART III.

#### Chap. I.—*Consistorial and Maritime Causes.*

161. The form of process in consistorial and maritime causes shall be the same, as nearly as possible, with

that in ordinary actions before the Sheriff Court.

#### Chap. II.—*General Regulations.*

162. In all depending causes, the interlocutors of Court must be written on a separate sheet or sheets of paper, and not on the pleadings of the parties.

163. In every process there shall be an inventory to accompany it, in which every paper given in shall be entered, with its corresponding number, by the party who lodges it. The Sheriff-Clerk shall mark all pleadings and productions (or when several productions are lodged at once, the inventory thereof), with the date of lodging the same; and shall also keep another inventory, in terms of 1 & 2 Vict. c. 119, § 16.

164. The Sheriff-Clerk, or his depute, shall keep a transmission-book, in the form of Schedule (B) annexed to the Act 1 & 2 Vict. c. 119; and he shall, besides, insert therein two columns

to show the date of the Sheriff's receiving each process, and of his returning it advised, in terms of § 16 of the said Act.

165. The Sheriff-Clerk shall take up a roll of motions on the enrolment of any of the parties, which shall be called on each Court-day. And each Sheriff shall make such regulations with reference to the roll, and to the Court-book or diet-book, as are applicable to the circumstances of his county.

166. It is hereby declared that the term Sheriff in the present Act of Sederunt shall include Sheriff-Substitute in all cases, except in such passages as relate to appeal from the Sheriff-Substitute to the Sheriff; or where, from the context, it is obvious that *this* is not intended.

### ACT OF SEDERUNT as to the Form of Judgments to be pronounced in Inferior Courts in Cases of Proof.—Edinburgh, 15th February, 1851.

When in causes commenced in any of the Courts of the Sheriffs, or of the Magistrates of Burghs, or other inferior Courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Sheriffs or other Judges in the said Courts shall, in their judgment, proceeding upon such

proof, distinctly specify the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found—or on the matter of law—and the several points of law which they mean to decide.



16 & 17 *Vict. c. 80*.—An ACT to facilitate Procedure in the Sheriff Courts in Scotland—15th August, 1853.

Whereas an Act was passed in the first year of the reign of Her present Majesty, entitled *An Act for the more effectual recovery of Small Debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt causes by the Sheriffs in Scotland* (7 Will. IV. & 1 Vict. c. 41); and another Act was passed in the Session of Parliament held in the first and second years of the reign of Her present Majesty, intituled *An Act to regulate the constitution, jurisdiction, and forms of process in Sheriff Courts in Scotland* (1 & 2 Vict. c. 119); And whereas it is expedient to facilitate procedure in the Sheriff Courts in Scotland, and to make further provision for the cheap and speedy administration of Justice in the said Courts: Be it therefore enacted, &c.

PROCEEDINGS IN ORDINARY CAUSES.

1. With respect to cases in the Sheriff Court, other than those provided for by the first-recited Act, as extended by this Act, be it enacted as follows:—

[*Short form of Summons.*].—The summons shall be in the form, as nearly as may be, of the Schedule (A) annexed to this Act, and such short form shall be equally effectual to all intents and purposes, including arrestment on the dependence where the summons contains a warrant to arrest in terms of such schedule, as the forms at present in use.

2. [*Decree in absence. Provision for reponing.*].—Where no appearance shall be entered for the defender, the Sheriff may, at any Court held after the day of compareance, give decree in terms of such summons, in like manner as at present, where no appearance is made for the defender, and such decree shall be in all respects equivalent to a decree in absence obtained under the forms at present in use: Provided always, that the defender may obtain himself reponed against such decree, whether extracted or not, at any time before implement has followed thereon, or against such part thereof as may not have been implemented, by lodging with the Sheriff-Clerk a reponing note in the form in Schedule (B) annexed to this Act, and consigning therewith the sum of expenses decerned for, a copy of which note shall at the same time be delivered or transmitted through the post-office to the pursuer or his agent in the action, and a certificate by the Sheriff-Clerk that such note has been lodged shall operate as a sist of diligence; and where such note shall have been lodged and consignment made as aforesaid, the Sheriff shall pronounce a judgment reponing the defender, and shall also appoint the consigned money to be paid over to the pursuer, unless special cause be shown to the contrary, and the cause shall thereafter proceed in all respects as if appearance were made therein, in manner hereinafter pro-

vided, of the date of such judgment : Provided always, that where a charge has been given, or any step of diligence has been taken, on the decree, prior to the application to be reponed, it shall be competent to the Sheriff in the course of the proceedings in the cause to decern in favour of the pursuer for the expense of such charge or diligence, or such part thereof as may be just.

3. [*Procedure where defender enters appearance. Condescendence and defences to be lodged.*].—Where the defender intends to state a defence, he shall enter appearance by lodging with the Sheriff-Clerk, at latest on the day of compareance, a notice in the form of Schedule (C) annexed to this Act ; and on the first Court-day thereafter, or on any other Court-day to which the diet may be adjourned, not being later than eight days thereafter, the Sheriff shall hear the parties in explanation of the grounds of action and the nature of the defence to be stated thereto, and if satisfied that no further written pleadings are necessary he shall cause a minute in the form of the Schedule (D) annexed to this Act to be written on the summons, setting forth concisely the ground of defence, which minute shall be subscribed by the parties or their procurators, and the Sheriff shall thereupon close the record by writing under the said minute "record closed," and signing and dating the same ; but if the Sheriff shall be satisfied that the record cannot properly be made up without condescendence and defences, he shall pronounce an order for the same ; and in such event the pursuer shall, within six days thereafter, lodge with the Sheriff-Clerk a condescendence setting forth articulately, and as concisely as may be, without any argument or unnecessary matter, the facts necessary to found the conclusions of the summons which he avers and is ready to prove, together with a note of pleas in law ; and the defender shall, within ten days after the lodging of such condescendence, lodge his defences, setting forth articulately his answers to such condescendence, and also, where necessary, setting forth articulately, under a separate head, any counter-statements necessary for his defence which he avers and is ready to prove, and there shall be appended to such defences a note of the defender's pleas in law, and such defences shall be framed as concisely as may be, without any argument or unnecessary matter.

4. [*Record to be made up and closed.*].—The Sheriff-Clerk shall, as soon as defences are lodged, transmit the process to the Sheriff, who shall consider the same, and shall as soon as may be, and at latest within six days after the date of lodging the defences, appoint the parties or their procurators to meet him, and shall at such meeting, if dilatory defences have been stated, dispose at once, where possible, of such dilatory defences, or may reserve consideration of them till a future stage of the cause ; and unless where the pursuer is willing to close on summons and defences, the Sheriff may, if he thinks fit, order one revisal of the condescendence and defences respectively, which revisal shall be made upon the original papers, unless the Sheriff, for special cause assigned, shall direct to the contrary ; and

as soon as revised defences are lodged the Sheriff-Clerk shall transmit the process to the Sheriff, who shall thereupon appoint the parties or their procurators to meet him as soon as may be, and at latest within six days after the date of the lodging of the revised defences; and at such meeting after the lodging of the defences, or the revised defences, as the case may be, or at an adjourned meeting, if the Sheriff has seen fit to adjourn (which he is hereby authorised to do, where necessary, but for no longer period than eight days), the Sheriff shall allow the pursuer or his procurator to put upon record, in concise and articulate form, where this has not been already done, his answers to the defender's statement of facts, or a simple minute of denial where that shall be deemed by the Sheriff to be sufficient, and shall allow each party to adjust his own part of the record, and shall strike out of the record any matter which he may deem to be either irrelevant or unnecessary; and the record shall then be closed by the Sheriff writing upon the interlocutor sheet the words "record closed," and signing and dating the same.

5. [*After record is closed Sheriff to hear parties or to appoint diet for proof, and to dispose of case.*].—After the record is closed, the Sheriff shall hear the parties or their procurators upon the merits of the cause, and upon their respective pleas, or, where he deems proof to be necessary, shall appoint a diet for proof on an early day, and shall hear the parties or their procurators after such proof is led; and after such hearing, or such proof and hearing, as the case may be, the Sheriff shall pronounce judgment with the least possible delay: Provided always, that it shall be competent to the Sheriff, on the written consent of both parties, to dispose of the cause upon the papers without further statement or argument.

6. [*Periods for lodging papers peremptory; but prorogations may be granted of consent, and once on cause shown.*].—Where any condescendence or defences, or revised condescendence or revised defences, or other paper, shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received, on payment of such sum in name of expenses as he shall think just: Provided always that the periods appointed for lodging any paper or for transmitting any process to the Sheriff, or for closing a record, may always be once prorogated by the Sheriff without consent on special cause shown, and may always be prorogated by written consent of parties, with the approbation of the Court; and in every interlocutor prorogating on special cause shown the time for lodging any paper the nature of such cause shall be set forth, and a definite time shall be therein fixed within which the paper is to be lodged.

7. [*Provision for causes commenced by petition.*].—In all applications before the Sheriff which are at present commenced by petition, and are not

otherwise regulated by this Act, the petition shall be as nearly as may be in the form of Schedule (E) annexed to this Act; and thereafter the procedure under such petition shall, as nearly as may be, be the same as hereinbefore provided in regard to ordinary actions.

8. [*Procedure in multiplepoindings.*].—In actions of multiplepoinding, the party raising the summons shall set forth in the body thereof who is the real raiser of the action; and the Sheriff shall, at the first calling of the cause, where no defences are stated, or where defences are stated and repelled at the first calling thereafter, pronounce an order for claims within a short space; and it shall be competent for any number of parties whose claims in such action depend upon the same ground to state such claims in the same paper; and as soon as the parties who shall appear and claim an interest in the fund shall have lodged their claims, or had opportunity allowed them for doing so, the Sheriff shall appoint the parties or their procurators to meet him; and at such meeting he shall allow each party to adjust his own part of the record, and to meet the averments of any other claimant or claimants so far as necessary, and the procedure at such meeting, and in the after progress of the cause, shall be as nearly as may be the same as is hereinbefore provided with reference to ordinary actions after defences have been lodged.

9. [*Short forms of execution provided.*].—Every execution of a summons, and every execution of service of a petition, shall be written at the end of the summons or petition itself, and where necessary on continuous sheets, but not on a separate paper; and such execution shall be in the form, or as nearly as may be in the form of Schedule (F) annexed to this Act, which form shall be equally valid and effectual in all respects as the longer form of execution at present in use.

10. [*Written proofs abolished; and proofs how to be taken. Absent or aged or infirm witnesses may be examined on commission. Remits may be made to person of skill, and, if of consent, his report shall be final.*].—Where proof shall be allowed, a diet of proof shall be appointed, at which the evidence shall be led before the Sheriff, who shall with his own hand take a note of the evidence, setting forth the witnesses examined, and the testimony given by each, not by question and answer, but in the form of a narrative, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received; which note of the evidence shall be forthwith lodged in process, and the Sheriff-Clerk shall mark the documents admitted in evidence, and also separately, and documents tendered and rejected; and the diet of proof shall not be adjourned, unless on special cause shown, which shall be set forth in the interlocutor making the adjournment; and the proof shall be taken as far as may be continuously, and with as little interval as the circumstances or the justice of the case will admit of; and the note of the evidence given by each witness shall be read over to him by the Sheriff, and signed by the witness (if he can write) on the last page in open Court

before the witness is dismissed : Provided always, that in the event of the Sheriff being unavoidably prevented from taking such notes with his own hand, he shall dictate the same to any competent person he may select : Provided always, that it shall be competent to the Sheriff, where any witness or haver is resident beyond the jurisdiction of the Court, or by reason of age, infirmity, or sickness is unable to attend the diet of proof, to grant commission to any person competent to take and report in writing the evidence of such witness or haver : Provided also, that it shall be competent to the Sheriff to remit to persons of skill or other persons to report on any matter of fact, and where such remit shall be made of consent of both parties the Sheriff shall hold the report to be final and conclusive with respect to the matter of such remit.

11. [*Certified copy interlocutor of proof to be warrant for citing witnesses and havers, and to be operative by simple indorsation in other counties.*].—When a diet of proof shall be appointed by the Sheriff, a copy, certified by the Sheriff-Clerk, of the interlocutor fixing such diet, or of that portion of such interlocutor which relates to that matter, shall be a sufficient warrant to any sheriff-officer in *Scotland* (acting within his own county) to cite witnesses and havers, at the instance either of the pursuer or defender, to attend such proof ; and such warrant shall have the same force and operation in any other county as in the county in which it was issued, the same being, in every case in which it is executed in another county from that in which it is issued, indorsed by the Sheriff-Clerk of such other county, who is hereby required to make and date such indorsation ; and the citation and execution thereof shall be in the form of Schedule (G) annexed to this Act ; and if any witness or haver duly cited on a citation of at least forty-eight hours shall fail to appear, he shall forfeit and pay a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained by the Sheriff, for which penalty decree shall be given by the Sheriff in favour of the party in whose behalf he was cited ; and it shall be further competent to the Sheriff to grant second diligence for compelling the attendance of such witness or haver, the expense whereof shall in like manner be decerned for against the witness or haver against whom the same has been issued, unless a special reason to the contrary be stated, and sustained by the Sheriff.

12. [*Written argument abolished, and oral pleadings substituted.*].—The parties or the procurators shall be entitled to be heard orally when the cause shall be ripe for judgment, and on the import of any concluded proof, and at any other stage of the cause when argument may be necessary and shall be appointed by the Sheriff ; and it shall not be competent, at any stage of the cause, to receive any written argumentative pleading, excepting as hereinafter provided ; but the Sheriff shall, if required by either of the parties, take a note of the authorities cited in the course of the oral argument, and also, where he shall see fit, of the argument, and such note shall form part of the process.

13. [*Sheriff in deciding to state the grounds of his judgment.*].—In all cases

where a Sheriff-Substitute or Sheriff pronounces an interlocutor disposing of a dilatory defence or sisting process, or deciding on the admissibility of evidence or any plea of confidentiality, or giving any interim decree, or disposing in whole or in part of the merits of the cause, it shall be the duty of such Sheriff-Substitute or Sheriff, as the case may be, to set forth in such interlocutor, or in a note appended to and issued along with it, the grounds on which he has proceeded.

14. [*Decree of expenses to include expense of extract.*].—Every decree for expenses pronounced after the passing of this Act shall be held to include a decree for the expense of extracting the same.

15. [*Action not prosecuted dismissed.*]

16. [*Judgment of the Sheriff-Substitute may be appealed against by petition or hearing. Review by Sheriff to be obtained by simple appeal.*]

17. [*No appeal allowed during the leading of the proof.*]

18. [*Except by persons pleading confidentiality, or objecting to production of writings.*].—Provided always, that nothing in this Act contained shall preclude any person, whether party to the cause or not, who may plead confidentiality, whether with reference to documentary or oral evidence, or any person, not being a party to the cause, who may object to produce writings, whether on pleas of alleged hypothec or otherwise, from taking to review any judgment of the Sheriff-Substitute or Sheriff disposing of such pleas, in whole or in part; but the judgment of the Sheriff-Substitute disposing of such pleas shall only be reviewable by such person taking an appeal at the time in open Court, which appeal shall be minuted by the Sheriff-Substitute, and thereupon such part of the proceedings as may be necessary for the disposal of such appeal, or as the Sheriff may require, shall be transmitted by the Sheriff-Clerk to the Sheriff, who shall dispose of the same summarily, but may appoint a hearing before giving judgment: Provided also, that no such appeals by any such person pleading confidentiality as aforesaid, or by any such person objecting to produce writings as aforesaid, shall be held to remove the cause from before the Sheriff-Substitute as regards any point or points not necessarily dependent on the interlocutor or judgment appealed from; but as to all such points, the cause may be proceeded with before the Sheriff-Substitute as if no such appeal had been taken.

19. [*No appeal allowed (except in certain cases) till judgment on the merits.*]

20. [*Where mistakes in a judgment may be corrected without review.*].—It shall be competent to any Sheriff-Substitute or Sheriff to correct any merely clerical error in his judgment at any time before the proceedings have been transmitted to the judge or Court of review, not being later than seven days from the date of such judgment.

21. [*Procedure in consistorial and maritime causes.*].—The procedure in consistorial and maritime causes shall be as nearly as may be the same as is hereinbefore provided with reference to ordinary actions.

22. [*Judgment of Sheriff in causes not exceeding £25 to be final.*].—It

shall not be competent, except as hereinafter specially provided for, to remove from a Sheriff Court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other Court or tribunal whatever, by advocacy, appeal, suspension, or reduction, or in any other manner of way, any cause not exceeding the value of twenty-five pounds sterling, or any interlocutor, judgment, or decree pronounced or which shall be pronounced in such cause by the Sheriff.

23. [*Causes of any value may be tried in a summary way by consent of all the parties.*—It shall be competent in all civil causes above the value of twelve pounds, competent before the Sheriff, for the parties to lodge in process a minute, signed by themselves or their procurators, setting forth their agreement that the cause should be tried in the summary way provided in the said first-recited Act, and the Sheriff shall thereupon hear, try, and determine such action in such summary way, and in such case the whole powers and provisions of the said first-recited Act shall be held applicable to the said action : Provided always, that the parties, or any of them, shall be entitled to appear and plead by a procurator of Court.

24. [*In cases exceeding £25, review limited to final judgments, &c.*—It shall be competent, in any cause exceeding the value of twenty-five pounds, to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses, or although the expenses, if such have been found due, have not been modified or decerned for ; but it shall not be competent to take to review any interlocutor, judgment, or decree of a Sheriff, not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause as aforesaid ; and the provisions of an Act passed in the fiftieth year of the reign of His Majesty King George the Third, intituled *An Act for abridging the form of extracting decrees of the Court of Session in Scotland, and for the regulation of certain parts of the proceedings of that Court*, and also the provisions of an Act passed in the sixth year of the reign of His Majesty King George the Fourth, intituled *An Act for the better regulating of the forms of process in the Courts of Law in Scotland*, are in so far as inconsistent with this enactment, hereby repealed ; Provided always, that when any interlocutor shall be brought under review of the Court of Session, it shall be competent for that Court also to review all the previous interlocutors pronounced in the cause.

25. [*Where either party desires it, case to go at once to the Inner House.*]

26. [*Small Debt jurisdiction extended to causes not exceeding £12.*—And with respect to small debt cases not exceeding twelve pounds :

The provisions of the said first-recited Act shall be extended to all causes, prosecutions, applications for sequestration and sale, and other actions and proceedings of the nature set forth in the said first-recited Act, wherein the debt, demand, or penalty in question, or the fund *in medio*, shall not exceed the value of twelve pounds, exclusive of expenses and fees of extract ; and

the said first-recited Act shall be read and construed as if the words "twelve pounds" were substituted for the words "eight pounds six shillings and eightpence," wherever these latter words occur in the said first-recited Act; Provided always that in any case in which a decree pronounced by the Sheriff in the Small Debt Court for any sum exceeding eight pounds six shillings and eightpence shall have been put to execution by imprisonment, the party so imprisoned shall be entitled to bring such decree under review of the Sheriff by way of suspension and liberation, and such suspension and liberation shall proceed in the form provided for summary petitions by this Act.

#### PROCEEDINGS IN SEQUESTRATIONS FOR RENT.

27. And with respect to proceedings before the Sheriff Court for sequestration and sale for recovery or in security of rents, be it enacted as follows :

[*Petition for sequestration may also conclude for payment.*].—Every petition for sequestration and sale for recovery or in security of rents, whether such petition be presented after the term of payment or *currente termino*, may contain a prayer for a decree for payment of the rent with reference to which the petition is presented, and it shall be competent to the Sheriff to pronounce, under such petition, decree for payment of such rent or any part thereof, and every such decree shall be extractable in ordinary form, and shall otherwise have the same force and effect in every respect as any decree for payment pronounced in any petition for sequestration and sale in which a decree for payment of rent might be competently inserted before the passing of this Act.

28. [*Operation of provisions in first-recited Act extended.*].—The provisions of the said first-recited Act for the summary trial and determination of sequestrations for rent where the rent or balance of rent does not exceed the sum of eight pounds six shillings and eightpence (and which provisions are made applicable by this Act to sequestration for rent where the rent or balance of rent does not exceed the sum of twelve pounds), are declared to extend, and the same are hereby extended to all sequestrations applied for *currente termino* or in security.

#### PROCEEDINGS IN ACTIONS OF REMOVING.

29. And with respect to actions of removing before the Sheriff Court, be it enacted as follows :

[*Time within which summons may be raised.*].—It shall be competent to raise a summons of removing at any time, provided there be an interval of at least forty days between the date of the execution of the summons and the term of removal, or where there is a separate ish as regards land and houses or otherwise, between the date of the execution of the summons and the ish which is first in date.



30. [*Lease containing obligation to remove equivalent to decree of removing, provided forty days' notice be given.*].—Where any lands or heritages are held under a probative lease, specifying a term of endurance, such lease, or an extract thereof from the books of any Court or record, shall have the same force and effect in every respect as any extract decree of removing obtained in any ordinary action of removing at the instance of the party, granter of such lease, or in the right of the granter of such lease, against the party in possession under such lease, whether such party in possession be the lessee named in such lease or not, decerning such party in possession, his family, sub-tenants, cottars, and dependants, with their goods and gear, to be removed and ejected from the said lands or heritages at the term or terms corresponding to the expiration of the term or terms of endurance specified in such lease; and such lease or extract thereof shall, along with a written authority signed by the landlord or his factor or agent, be a sufficient warrant to any sheriff-officer or messenger-at-arms of the county within which such lands or heritages are situate to remove and eject such party in possession, and his foresaids from such lands or heritages on the elapse of such specified term or terms respectively, and to return an execution thereof in common form: Provided always, that previous notice to remove shall be given to such party in possession, at least forty days before the expiration of the term of endurance specified in such lease, or where the lease has a separate ish as regards land and houses or otherwise, at least forty days before that ish which is first in date, by causing to be delivered to such party in possession, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post-office, previous to the commencement of such period of forty days, a notice by a sheriff-officer of the county in which such lands or heritages are situate, or messenger-at-arms, in the form in Schedule (I) annexed to this Act; and a certificate endorsed on such lease or extract that such notice has been duly given, signed by a sheriff-officer of such county, or messenger-at-arms, and attested by one witness, in the form in Schedule (J) annexed to this Act, or an acknowledgment to that effect endorsed thereon by such party in possession himself, or by his known agent on his behalf, shall be sufficient evidence that such notice has been given: Provided also, that no such removal or ejectment by virtue of this enactment shall be competent after six weeks have elapsed from the expiration of the term of endurance specified in such lease, or where the lease has a separate ish as regards lands and houses or otherwise, after six weeks have elapsed from that ish which is last in date; and provided further, that nothing herein contained shall be construed to prevent any proceedings under this enactment from being brought under suspension in common form.

31. [*Letter of removal granted by tenant equivalent to decree of removing, provided forty days' notice be given.*].—Where any tenant in possession of any lands or heritages shall, whether at the date of entering upon his lease or at any other time, grant a letter of removal, either holograph or attested by one witness, in the form in Schedule (K) annexed to this Act,

such letter of removal shall have the same force and effect in every respect as any extract decree of removing obtained in any ordinary action of removing at the instance of the party to whom such letter of removal is granted, or of the party in his right, against the party granter of such letter of removal, or the party in his right as tenant, decerning such party granter of such letter, or such party in his right, as the case may be, his family, sub-tenants, cottars, and dependants, with their goods and gear, to be removed and ejected from the said lands and heritages at the term or terms of removal respectively specified in such letter of removal; and such letter of removal shall be a sufficient warrant to any sheriff-officer of the county within which such lands and heritages are situate to remove and eject such party granter of such letter of removal, or such party in his right, and his foressaids, from such lands and heritages, on the elapse of such specified term or terms respectively, and to return an execution thereof in common form: Provided always, that where such letter of removal shall bear date more than six weeks before the term of removal, or the ish first in date, specified in such letter of removal, previous notice to remove shall be given to the party granter of such letter of removal, or to such party in his right, at least forty days before such term of removal, or where such letter of removal specifies a separate ish as regards lands and houses or otherwise, at least forty days before that ish which is first in date, by causing to be delivered to such party granter of such letter of removal, or to such party in his right, or to be left at his ordinary dwelling-house, or to be transmitted to his known address through the post-office, previous to the commencement of such period of forty days, a notice by a sheriff-officer of the county in which such lands or heritages are situate, in the form of Schedule (I) annexed to this Act; and a certificate endorsed upon such letter of removal that such notice has been duly given, signed by a sheriff-officer of such county, and attested by one witness, in the form of Schedule (J) annexed to this Act, or an acknowledgment to that effect endorsed thereon by the granter of such letter of removal, or other party in his right, or by the known agent of the granter of such letter of removal, or other party on his behalf, shall be sufficient evidence that such notice has been given: Provided also, that no such removal or ejectment by virtue of this enactment shall be competent after six weeks have elapsed from the expiration of the term of endurance specified in such letter of removal, or where such letter of removal has a separate ish as regards lands and houses or otherwise, after six weeks have elapsed from that ish which is last in date; and provided further, that nothing herein contained shall be construed to prevent any proceedings under this enactment from being brought under suspension in common form.

32. [*Arrears of feu-duties for subjects of small amount may be sued for in Sheriff Court.*—And whereas it is desirable that the jurisdiction of the Sheriff should be extended to questions relating to non-payment of feu-duties for real subjects of small amount, wherever, in subjects not exceeding in yearly value the sum of twenty-five pounds, the vassal shall have run in

arrear of his feu-duty for two years : It shall be competent for the superior to raise an action before the Sheriff, in ordinary form, setting forth that the subject is of the value, and that the feu-duty has run in arrear as aforesaid, and concluding that the vassal should be removed from his possession, and that warrant to that effect should be granted, and thereafter the cause shall proceed in the manner herein provided in ordinary actions ; and if the defendant shall fail to appear, or if it shall be proved to the Sheriff by such evidence as he may require that the subject is of the value, and that the feu-duty is in arrear as aforesaid, he shall grant warrant in terms of the conclusions of the summons, which warrant shall be executed at the first term of *Whitsunday* or *Martinmas*, which shall first occur, four months after the same is issued by the Sheriff, and such warrant, so executed, shall have the effect, in relation to the said possession, of a decree of irritancy *ob non solutum canonem* : Provided always, that it shall be competent to the vassal, at any time within one year from the date of such removal, to raise an action of declarator in the Court of Session for vindication of such subject on any ground proceeding on challenge of the title of the superior, which shall not be called in question before the Sheriff except on grounds instantly verified by the titles of the superior, and that it shall be competent to the vassals, at any time before such warrant is executed, to purge the irritancy incurred by payment of the arrears pursued for, with the expenses incurred by the superior in such proceedings ; provided also, that in leases for a longer endurance than twenty-one years the landlord shall have the like remedies against his tenant, in case of the non-payment of rent, *mutatis mutandis*, that are hereby given to the superior against his vassal.

33. [*Libels may be written or printed, or partly both, but authenticated as libels now are.*]

34. [*Libel printed or partly printed to be inserted in record book.*]

35. [*The will of criminal libels to contain two diets of compareance as in schedule, and accused to be called upon at first diet to plead guilty or not guilty.*]

36. [*Sheriff not to ask party more than once to plead.*]

#### SALARIES OF SHERIFFS AND SHERIFF-SUBSTITUTES.

37. And with respect to the salaries and remuneration of Sheriffs and Sheriff-Substitutes be it enacted as follows :—

[*Salaries of Sheriffs and Sheriff-Substitutes may be increased, and additional Sheriff-Substitutes may be appointed.*]—It shall be lawful to grant to any Sheriff such salary as to the Commissioners of Her Majesty's Treasury may seem meet, not being less than Five hundred pounds by the year, and to any salaried Sheriff-Substitute now in office, or to his successor, or to any Sheriff-Substitute who may be hereafter appointed by virtue of this Act, such salary as to the Commissioners of Her Majesty's Treasury may seem meet, the same not in any case exceeding One thousand pounds

by the year, and not less than Five hundred pounds by the year ; and every salary payable to such Sheriff or Sheriff-Substitute shall be paid by four equal quarterly instalments out of the funds from which the salaries of Sheriffs are payable ; and it shall be lawful for Her Majesty and her heirs and successors, upon the joint recommendation of the Lord President of the Court of Session, Her Majesty's Advocate, and the Lord Justice-Clerk, all for the time being, to grant authority to any Sheriff to appoint one or more additional Sheriff-Substitutes ; Provided always, that such joint recommendation shall expressly bear that the appointment of such additional officer or officers is essentially necessary for the public service ; and provided also, that no more than two additional Sheriff-Substitutes in each county shall be appointed under the powers hereby conferred.

38. [*Provision for retiring allowance to Sheriffs and Sheriff-Substitutes disabled after long service.*].—It shall be lawful for the Commissioners of Her Majesty's Treasury to grant to any person who has held, now holds, or may hereafter hold the office of Sheriff-Substitute such annuity as is by the said second-recited Act authorised to be granted in respect of long service for one or other of the periods specified in the said second-recited Act, notwithstanding such service may not have been continuous, and may have been in different counties ; and the said commissioners shall have the same powers of granting annuities to Sheriffs in respect of long service as are conferred by the said second-recited Act and by this Act with reference to Sheriff-Substitutes, and such annuities shall be payable out of the funds from which the salaries of Sheriffs are payable : Provided always, that no such annuity shall be granted to any Sheriff or Sheriff-Substitute, unless the periods of his actual service as Sheriff or Sheriff-Substitute as the case may be, shall, when taken together, extend to one or other of the periods of service specified in the said second-recited Act ; and that in computing the amount of retiring allowance of such Sheriffs the emoluments drawn by them on average of the five preceding years shall be held to constitute their salary.

39. [*Sheriffs' Salaries to be in lieu of all fees, &c.*].—The salaries henceforth to be paid to the Sheriffs and Sheriffs-Substitute shall be in full of all fees and emoluments whatever.\*

40. [*Commissions to Sheriffs-Substitute to extend over the whole county.*].—

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\* Excerpt from Queen's Warrant augmenting the Salaries of the Sheriffs and Stewards-Depute and their Substitutes in Scotland, dated 3rd January, 1854.

But it is expressly declared that the salaries hereby provided to the Sheriffs and Stewards-Depute and their Substitutes are granted in full compensation for all the duties of every description hitherto performed by or which

may be hereafter required of them—that the Sheriffs and Stewards-Depute and their Substitutes are prohibited and excluded from acting as referees or arbitrators in every case of reference or submission not specially required of them by law, and that the said salaries are to cover and include all fees, allowances, expenses, compensations, and emoluments whatever.

The commissions already granted or to be granted by all Sheriffs to the Sheriffs-Substitute shall extend over the whole county.

41. [*Compensation to Sheriff-Clerks.*]

PROVISION FOR THE SITTINGS OF SHERIFF COURTS, &c.

42. And with respect to the Sittings of the Sheriff Courts, and the more efficient operation of this Act, be it enacted as follows :—

[*Sheriff Courts to sit such days during session for despatch of civil business as may be fixed by Sheriff and approved of.*].—Each Sheriff Court, except those held at a place where an ordinary Sheriff-Substitute does not reside, shall sit for the despatch of ordinary civil business for such number of days weekly during the session as shall be fixed by each Sheriff by a regulation of Court, to be approved of by the said Lord President and Lord Justice-Clerk, and to be advertised at least once a-year in a newspaper published in the county, or where there is no such newspaper, in a newspaper published in some county immediately adjoining.

43. [*Sheriffs to hold three sessions in each year.*]

44. [*Sheriff may act in time of vacation.*].—All summary causes may proceed equally during vacation as during session ; and it shall be competent to the Sheriff, if he thinks fit, to pronounce interlocutors in time of vacation, in all causes, whether summary or not.

45. [*Sheriff to fix one court-day in each vacation for despatch of ordinary Court business.*]

46. [*Sittings to be held by Sheriffs in their counties.*].—Every Sheriff shall, unless prevented by indisposition or other unavoidable cause, hold annually in his county sittings for the discharge of the judicial business of the county ; that is to say, the Sheriffs of *Sutherland, Caithness and Inverness, Ross and Cromarty, Argyle, Banff, and Elgin and Nairne*, shall hold three such sittings, and the Sheriffs of the other counties shall hold four such sittings in the course of the year ; and such sittings shall continue until the causes ready for trial or hearing when such sittings commence be disposed of ; and such sittings shall, except as regards the counties of *Ross, Inverness, and Argyle*, be held at each of the places within his county at which the ordinary Courts of the Sheriff-Substitutes are held, and such other places as the Sheriff, with approval of the Secretary of State for the Home Department, may appoint, and as regards the counties of *Ross, Inverness, and Argyle* at such places as the Sheriff, with approval of the Secretary of State, may appoint : Provided always, that the Sheriffs of the said three counties shall at least twice a-year hold one such sitting at each of the places at which the ordinary Courts of the Sheriff-Substitutes are held ; and each Sheriff shall give due notice to the county of the times and places of such sittings, and such sittings shall take place at intervals of not less than six weeks ; and each Sheriff shall, once in the year, go on the Small Debt Circuit in use to be held by the

Sheriff-Substitute, and shall on such occasions, in addition to holding the Small Debt Court, despatch as much of the ordinary business as may be ready for adjudication, or as time may permit; and each Sheriff shall annually, within ten days after the twelfth day of *November*, make a return to Her Majesty's Principal Secretary of State for the Home Department of the number of sittings held by him, and of the periods of holding each such sitting, in the immediately preceding year, stating the cause of absence in case the sittings herein-before directed shall not have been held by him in terms of this Act; provided that none of the said provisions shall extend to the counties of *Orkney* and *Shetland*, and *Mid-Lothian* and *Lanark*; and so much of an Act passed in the first and second year of the reign of Her present Majesty, intituled *An Act to regulate the constitution and jurisdiction and forms of process of the Sheriff Courts in Scotland* (1 & 2 Vict. c. 119) as relates to the Courts to be held by each Sheriff-Depute in his county, excepting the said counties of *Orkney* and *Shetland*, is hereby repealed.

47. [*Sheriff may sign interlocutors when furth of his county.*—It shall be lawful for any Sheriff to pronounce and sign any interlocutor, judgment, or decree when furth of his sheriffdom; and such interlocutor, judgment, or decree shall have all the like force and effect as if pronounced and signed by the Sheriff while within the limits of his sheriffdom.

48. [*Privilege of Members of College of Justice abolished.*—No person whatsoever shall be exempt from the jurisdiction of the Sheriff Court, in any cause, on account of privilege by reason of being a member of the College of Justice.\*

49. [*Court of Session to frame tables of fees.*—The Court of Session shall be and is hereby authorised and required to frame from time to time a table or tables of fees for business in the Sheriff Courts of *Scotland*, and such table or tables of fees so framed shall be submitted to the Secretary of State for the Home Department, and if approved of shall form the rule of professional charge for business performed in such Courts.

50. [*Interpretation Clause.*—In construing this Act, unless where the context is repugnant to such construction, the word "Sheriff" shall be held to include Sheriff-Substitute; the word "tenant" shall include sub-tenant; and the word "lease" shall include sub-lease.

51. [*Recited Acts, &c., Repealed.*—The said recited Acts, and all laws, statutes, Acts of Sederunt, and usages now in force, shall be and the same are hereby repealed, but that in so far only as may be necessary to give effect to the provisions of this Act, and no further or otherwise.

52. [*Act to take effect from 1st Nov. 1853.*]

\* The Act 13 & 14 Vict. c. 36 (to facilitate procedure in the Court of Session), enacts (sect. 17), "that no member of the College of Justice shall, in respect of any privilege as such, be entitled to institute any action or pro-

ceeding, either original or by way of review, before the Court of Session which could not have been instituted by him before such Court if he had not been a member of the College of Justice."

## SCHEDULES referred to in the foregoing Acts.

## SCHEDULE (A).

*Petitory Summons.*

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*Summons of Count and Reckoning and Payment.*

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*Summons of Multiplepoinding.*

## SCHEDULE (B).

[Date]

*Reponing Note.*In the action *A* against *B*.

The defender craves to be deponed against the decree in absence, dated  
[add, where necessary, so far as unimplemented.] The  
expenses decerned for are consigned with the Sheriff-Clerk.

*A*, Defender.[Or] *C*, Agent for Defender.

## SCHEDULE (C).

*Notice of Appearance.*

## SCHEDULE (D).

*Minute at the first calling of Cause, and where Defender makes Compareance.*

## SCHEDULE (E).

*Petition.*

## SCHEDULE (F).

*Form of Execution of Summons or Petition.*

This summons [or petition] executed [or served] by me [insert name],  
Sheriff-Officer, against [or upon] [insert name or names] defender [or de-

fender, or respondent, or respondents], *[state whether personally or otherwise]*, in presence of *[insert name and designation of witness]*, this day of                      eighteen hundred and                      years.  
*E F*, Sheriff-Officer.

*L M*, witness.

### SCHEDULE (G).

#### *Citation of Witnesses and Havers.*

*C D* *[design him]*. You are hereby cited to attend in the Sheriff-Court of the county of                      on                      the day of                      at                      o'clock, within to give evidence for the pursuer *[or defender]* in the action at the instance of *A* *[design him]* pursuer, against *B* *[design him]* defender, and that under the penalty of forty shillings sterling if you fail to attend. *[If a haver, say,]* And you are required to bring with you *[specify documents required]*. Dated this                      day of                      *E F*, Sheriff-Officer.

#### *Execution against Witnesses and Havers.*

Upon the                      day of                      I duly cited *C D* *[design him]* to attend in the Sheriff-Court of the county of                      on the                      day of                      at                      o'clock, within to give evidence for the pursuer *[or defender]*, in the action at the instance of *A* *[design him]* pursuer, against *B* *[design him]* defender. *[If a haver, say,]* And I also required him to bring with him *[specify documents]*. This I did by delivering a just copy of citation to the above effect, signed by me, to the said *C D* personally *[or otherwise, as the case may be]*.

*E F*, Sheriff-Officer.

### SCHEDULE (I).

#### *Notice to Remove.*

*[Place and date.]*

You are required to remove from the farm of *[insert name by which usually known]*, at the term of                      next, as to the houses and grass, and at the separation of the crop from the ground as to the arable land *[or as the case may be]*, in terms of the lease thereof *[or in terms of your letter of removal]*, dated                      *E F*, Sheriff-Officer.

*[Address]* *G H* *[design him.]*



## SCHEDULE (J).

*Certificate of Notice to Remove.*

[Place and date.]

I, *E F*, Sheriff-officer of the County of \_\_\_\_\_ certify, that  
 on the \_\_\_\_\_ day of \_\_\_\_\_ notice to remove, in terms of  
 this lease [or letter of removal] at \_\_\_\_\_ next [according to the  
*terms of the notice*], was, in presence of *L M* [design him], subscribing wit-  
 ness, given by me to *G H*, the tenant, by delivering such notice to him  
 personally [or by leaving such notice at his ordinary dwelling-house at  
 \_\_\_\_\_, or by transmitting such notice to him through the post-  
 office to his known address, as follows: (*insert address to which notice  
 sent*)].

*E F*, Sheriff-Officer.*L M*, witness.

## SCHEDULE (K).

*Letter of Removal.*

[Place and date.]

SIR,—I am to remove from the farm of [*insert name by which usually  
 known*], at the term of \_\_\_\_\_ eighteen hundred and  
 as to the house and grass, and at the separation of the crop from the ground  
 as to the arable land [*or as the case may be*].

I am,

Your obedient servant,

[Signed by the Tenant.]

[Address.]

*Note*.—If this letter is not holograph of the granter of it, it  
 must be attested by one witness, thus,—

*L M*, witness.

16 & 17 Vict. c. 92.—An ACT to diminish the number of  
 Sheriffs in *Scotland*, and to unite certain counties in  
*Scotland* in so far as regards the jurisdiction of the  
 Sheriff.—20th August, 1853.

WHEREAS it is expedient that the number of Sheriffs in *Scotland* should be  
 diminished, and that provision should be made for uniting certain  
 counties in so far as regards the jurisdiction of the Sheriff: Be it therefore  
 enacted by the Queen's most excellent Majesty, by and with the advice

and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Counties specified in schedule to be united, and provision for discharge of the functions of Sheriff of the united counties.*].—Whenever a vacancy shall occur in the office of Sheriff of any counties or county specified in the schedule hereunto annexed, such counties or county and the other counties or county named and included therewith in the said schedule shall be united into one sherrifdom, under the title specified in the said schedule, and the functions of the Sheriff of the counties or county in which the vacancy shall occur shall thereupon devolve on and be discharged by the Sheriff of such other counties or county so included therewith ; and such Sheriff shall thereafter be and be denominated the Sheriff of the said united counties and sherrifdom, without the necessity of any new commission being issued in his favour, and shall have and exercise all the jurisdiction, powers privileges, and authority competent to the Sheriffs of the said counties respectively.

2. [*County of Peebles to be united with County of Mid-Lothian.*].—Whenever vacancy shall occur in the office of Sheriff of the county of *Peebles*, the said county shall be united with the county of *Mid-Lothian* into one sherrifdom, to be called the sherrifdom of *Mid-Lothian and Peebles*, and the functions of the Sheriff of the said county of *Peebles* shall thereupon devolve on and be discharged by the Sheriff of *Mid-Lothian*, who shall be and shall be denominated the Sheriff of *Mid-Lothian and Peebles*, without the necessity of any new commission being issued in his favour, in like manner and to the like effect as is hereinbefore provided.

3. [*No separate appointments to be made to the office of Sheriff of counties to be united.*].—No separate appointment shall hereafter be made to the office of Sheriff of the said county of *Peebles*, or of any of the counties specified in the said schedule, but appointment shall only be made to the office of Sheriff of such united counties or sherrifdoms as vacancies shall occur after such union as aforesaid.

4. [*Saving rights, privileges, and liabilities of counties.*].— Provided always, that, excepting as regards the person by whom the office of Sheriff shall be held and discharged, nothing herein contained shall affect or alter in any way the rights, privileges, or liabilities of the said counties respectively.

5. [*Sheriffs of united counties not to be entitled to additional salary.*].— Provided also, that nothing herein contained shall give any right to the Sheriff of any such united counties to any additional salary beyond that enjoyed by him as Sheriff of any counties or county prior to any vacancy occurring as aforesaid.

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## SCHEDULE referring to the foregoing Act.

| Counties to be United.   | Title of Sheriffdom.                  | Title of Sheriff.                                    |
|--|---------------------------------------|--|
| 1. The County of Sutherland and the County of Caithness.                 | Sutherland and Caithness.             | The Sheriff of Sutherland and Caithness.             |
| 2. The County of Banff and the Counties of Elgin and Nairn.              | Banff, Elgin, and Nairn.              | The Sheriff of Banff, Elgin, and Nairn.              |
| 3. The County of Linlithgow and the Counties of Clackmannan and Kinross. | Linlithgow, Clackmannan, and Kinross. | The Sheriff of Linlithgow, Clackmannan, and Kinross. |
| 4. The County of Dumbarton and the County of Bute.                       | Dumbarton and Bute.                   | The Sheriff of Dumbarton and Bute.                   |
| 5. The County of Haddington and the County of Berwick.                   | Haddington and Berwick.               | The Sheriff of Haddington and Berwick.               |
| 6. The County of Roxburgh and the County of Selkirk.                     | Roxburgh and Selkirk.                 | The Sheriff of Roxburgh and Selkirk.                 |
| 7. The County of Wigton and the Stewartry of Kirkcudbright.              | Wigton and Kirkcudbright.             | The Sheriff of Wigton and Kirkcudbright.             |

33 & 34 *Vict.* c. 86.—An ACT to amend and extend the Act sixteenth and seventeenth Victoria, chapter ninety-two, to make further provision for uniting Counties in Scotland in so far as regards the Jurisdiction of the Sheriff; and also to make certain provisions regarding the Duties of Sheriffs and Sheriffs-Substitute in Scotland.—9th August, 1870.

WHEREAS it is expedient to amend and extend the Act sixteenth and seventeenth Victoria, chapter ninety-two, and to make further provision for uniting counties in Scotland in so far as regards the jurisdiction of the Sheriff; and also to make certain provisions regarding the duties of Sheriffs and Sheriffs-Substitute in Scotland:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. [*County of Kincardine to be united to county of Aberdeen.*—The county of Kincardine, the office of Sheriff whereof is now vacant, shall be and is hereby united with the county of Aberdeen into one Sheriffdom, to be called the Sheriffdom of Aberdeen and Kincardine, and the functions of the Sheriff of the said county of Kincardine shall devolve on and are hereby devolved on and shall be discharged by the Sheriff of the county of Aberdeen, who shall be and shall be denominated the Sheriff of Aberdeen and Kincardine, without the necessity of any new commission being issued in his favour.

2. [*County of Banff to be united with counties of Aberdeen and Kincardine, and counties of Elgin and Nairn to be united with county of Inverness.*]—Whenever a vacancy shall occur in the office of Sheriff of Banff, Elgin, and Nairn, the said counties shall be disunited and shall no longer constitute one sheriffdom, and the county of Banff shall be united with the counties of Aberdeen and Kincardine into one sheriffdom to be thereafter called the sheriffdom of Aberdeen, Kincardine, and Banff, and the functions of the Sheriff of the said county of Banff shall thereupon devolve on and be discharged by the Sheriff of Aberdeen and Kincardine, who shall be and shall be denominated the Sheriff of Aberdeen, Kincardine, and Banff, without the necessity of any new commission being issued in his favour; and the counties of Elgin and Nairn shall in like manner be united with the county of Inverness into one sheriffdom, to be called the sheriffdom of Inverness, Elgin, and Nairn, and the functions of the Sheriff of the counties of Elgin and Nairn shall thereupon devolve on and be discharged by the Sheriff of the county of Inverness, who shall be and shall be denominated the Sheriff of Inverness, Elgin, and Nairn, without the necessity of any new commission being issued in his favour.

3. [*Counties of Orkney and Shetland to be united with county of Caithness, and county of Sutherland to be united with counties of Ross and Cromarty.*]—The counties of Sutherland and Caithness are hereby disunited, and shall no longer constitute one sheriffdom, and the counties of Orkney and Shetland, the office of Sheriff whereof is now vacant, shall be and are hereby united with the county of Caithness into one sheriffdom to be called the sheriffdom of Caithness, Orkney, and Shetland, and the now existing Sheriff of Sutherland and Caithness shall be and is hereby relieved and discharged of his office of Sheriff, in so far as regards the county of Caithness; and the counties of Ross and Cromarty, the office of Sheriff whereof is now vacant, shall be and is hereby united with the county of Sutherland into one sheriffdom, to be called the sheriffdom of Ross, Cromarty, and Sutherland; and the functions of the Sheriff of the said counties of Ross and Cromarty shall devolve and are hereby devolved on and shall be discharged by the Sheriff of Sutherland, who shall be and shall be denominated the Sheriff of Ross, Cromarty, and Sutherland, without the necessity of any new commission being issued in his favour.

4. [*County of Linlithgow to be united with the county of Mid-Lothian, and*

*the county of Kinross to be united with the county of Fife.*—Whenever a vacancy shall occur in the office of Sheriff of Linlithgow, Clackmannan, and Kinross, the said counties shall be disunited and shall no longer constitute one sheriffdom, and the county of Linlithgow shall be united with the county of Mid-Lothian into one sheriffdom, to be called the sheriffdom of Mid-Lothian and Linlithgow, and the functions of the said Sheriff of Linlithgow shall thereupon devolve on and be discharged by the Sheriff of Mid-Lothian, who shall be and shall be denominated the Sheriff of Mid-Lothian and Linlithgow, without the necessity of any new commission being issued in his favour; and the county of Kinross shall be united with the county of Fife into one sheriffdom, to be called the sheriffdom of Fife and Kinross, and the functions of the Sheriff of Kinross shall thereupon devolve on and be discharged by the Sheriff of Fife who shall be and shall be denominated the Sheriff of Fife and Kinross, without the necessity of any new commission being issued in his favour; and the county of Clackmannan shall be united with the county of Stirling into one sheriffdom to be called the sheriffdom of Stirling and Clackmannan, and the functions of the Sheriff of Clackmannan shall thereupon be devolved on and be discharged by the Sheriff of Stirling, who shall be and shall be denominated the Sheriff of Stirling and Clackmannan.

5. [*County of Haddington to be united with the county of Mid-Lothian, and the county of Berwick to be united with the counties of Roxburgh and Selkirk.*]—Whenever a vacancy shall occur in the office of Sheriff of Haddington and Berwick the said counties shall be disunited and shall no longer constitute one sheriffdom, and the county of Haddington shall be united with the county of Mid-Lothian into one sheriffdom, to be called the sheriffdom of Mid-Lothian and Haddington, and the functions of the Sheriff of Haddington shall thereupon devolve on and be discharged by the Sheriff of Mid-Lothian, who shall be and shall be denominated the Sheriff of Mid-Lothian and Haddington, without the necessity of any new commission being issued in his favour; and the county of Berwick shall be united with the counties of Roxburgh and Selkirk into one sheriffdom, to be called the sheriffdom of Roxburgh, Berwick, and Selkirk, and the functions of the Sheriff of Berwick shall thereupon devolve on and be discharged by the Sheriff of Roxburgh and Selkirk, who shall be and shall be denominated the Sheriff of Roxburgh, Berwick, and Selkirk, without the necessity of any new commission being issued in his favour.

6. [*Sheriffdom of Mid-Lothian, Linlithgow, Haddington, and Peebles to be called the Sheriffdom of the Lothians and Peebles.*]—So soon as the counties of Mid-Lothian, Linlithgow, and Haddington are united as hereinbefore provided they shall constitute one sheriffdom to be called the sheriffdom of the Lothians, and when the county of Peebles is added thereto the said four counties shall be constituted one sheriffdom to be called the sheriffdom of the Lothians and Peebles.

7. [*Counties of Wigton and Kirkcudbright to be united with the county of*

*Dumfries.*—Whenever a vacancy shall occur in the office of Sheriff of Wigtown and Kirkcudbright the said counties shall no longer constitute one sheriffdom, but shall be united with the county of Dumfries into one sheriffdom to be called the sheriffdom of Dumfries and Galloway, and the functions of the Sheriff of Wigtown and Kirkcudbright shall thereupon devolve on and be discharged by the Sheriff of Dumfries, who shall be and shall be denominated the Sheriff of Dumfries and Galloway, without the necessity of any new commission being issued in his favour.

8. [*County of Dumbarton to be united with the county of Stirling, and county of Bute with the county of Renfrew.*—Whenever a vacancy shall occur in the office of Sheriff of Dumbarton and Bute, the said counties shall be disunited, and shall no longer constitute one sheriffdom, and the county of Dumbarton shall be united with the county of Stirling into one sheriffdom to be called the sheriffdom of Stirling and Dumbarton, and the functions of the Sheriff of Dumbarton shall thereupon devolve on and be discharged by the Sheriff of Stirling, who shall be denominated the Sheriff of Stirling and Dumbarton, without the necessity of any new commission being issued in his favour; and the county of Bute shall be united with the county of Renfrew into one sheriffdom to be called the sheriffdom of Renfrew and Bute, and the functions of the Sheriff of Bute shall thereupon devolve on and be discharged by the Sheriff of Renfrew, who shall be and shall be denominated the Sheriff of Renfrew and Bute, without the necessity of any new commission being issued in his favour.

9. [*Sheriffdom of Stirling, Dumbarton, and Clackmannan.*—As soon as the counties of Stirling, Dumbarton, and Clackmannan are united as hereinbefore provided, they shall constitute one sheriffdom, to be called the sheriffdom of Stirling, Dumbarton, and Clackmannan.

10. [*No separate appointments to be made to the office of Sheriff of the counties to be united.*—After any union of counties shall have occurred under the provisions of this Act, no separate appointment shall be made to the office of Sheriff of any counties so united, but appointment shall only be made to the office of Sheriff of such united counties or sheriffdoms as vacancies shall occur after such union.

11. [*Sheriff to have no right to additional salary.*—Nothing herein contained shall give any right to the Sheriff of any such united counties to any additional salary beyond that enjoyed by him as Sheriff of any county or counties before such union; but on any union taking place under this Act, it shall be lawful for the Lords of Her Majesty's Treasury to make such addition to the salary of the Sheriffs of the united counties as they shall deem reasonable, to be paid out of money to be provided by Parliament for that purpose.

12. [*Union of counties to be complete as regards jurisdiction, &c., of Sheriff, and powers, privileges, &c., of procurators.*—Every union of counties into one sheriffdom under the provisions of this and the recited Act, or either

of them, shall be deemed to be a complete union to all intents and purposes in so far as regards the jurisdiction, powers, and duties of the Sheriff and his Substitutes, and in so far as regards the powers, duties, rights, and privileges of procurators before the Courts of the Sheriff. And the several counties of any such united sheriffdom shall not thereafter be regarded as separate sheriffdoms or jurisdictions, but as one sheriffdom and jurisdiction, in so far as regards the powers, duties, rights, and privileges of the Sheriff and his Substitutes, and the procurators of the Sheriff's Court.

13. [*Courts to be held and duties to be discharged by Sheriffs.*].—It shall be lawful to Her Majesty, by one of her principal Secretaries of State, to prescribe from time to time the number of Courts to be held by the several Sheriffs of Scotland who shall be appointed after the passing of this Act, and the time and places for holding such Courts; and also from time to time to prescribe the duties of the office of Sheriff which such Sheriffs respectively are required to perform personally: Provided always, that nothing herein contained, and no order made or direction given under the authority of this clause, shall affect the validity or legal authority of any act done by any Sheriff or Sheriff-Substitute in pursuance of his jurisdiction and lawful authority; and so much of the Act of the first and second Victoria, chapter one hundred and nineteen, as provides that every Sheriff, with the exception of the Sheriffs of the counties of Edinburgh and Lanark, shall after his appointment be in habitual attendance upon the Court of Session during the sittings thereof, shall be and is hereby repealed; but nothing herein contained shall affect the qualification for appointment to the office of Sheriff as prescribed by the said Act.

14. [*Courts to be held and duties to be discharged by Sheriffs-Substitute.*].—It shall be lawful to Her Majesty, by one of her principal Secretaries of State, from time to time to prescribe the number of salaried Sheriffs-Substitute of the several counties or sheriffdoms, and the places at which such salaried Sheriffs-Substitute respectively are required generally to reside and attend for the performance of their duties, and the number of Courts to be held by them, and the times and places of holding such Courts.

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37 & 38 Vict. c. 64.—An ACT to further alter and amend the Law of Evidence in Scotland, and to provide for the recording, by means of Shorthand Writing, of Evidence in Civil Causes in Sheriff Courts in Scotland.—7th August, 1874.

4. [*Shorthand writers may be employed to record evidence in Sheriff Courts.*].—In every case of a proof in a civil cause or proceeding in a Sheriff Court in Scotland, and in every case of evidence being taken in any such

cause or proceeding to lie in *relevis*, the following provisions shall have effect :—

- (1.) It shall be competent to the Sheriff, on the motion of any party to the cause or proceeding, and if he sees fit, to cause the evidence to be taken down and recorded in shorthand, by a writer skilled in shorthand writing, to whom the oath *de fidei administratione* shall be administered, provided that the Sheriff shall himself dictate to the shorthand writer the evidence he is to record, and a note of the documents adduced and any admissions made by the parties :
- (2.) When a shorthand writer is so employed, he shall be appointed by the Sheriff, and paid by the parties in the first instance equally ; and the extended notes of such shorthand writer, certified by him as correct, shall be the record of the oral evidence in the case ; provided that, should the correctness of the said record of evidence be questioned, it shall be competent to the Sheriff to satisfy himself in regard thereto, by the examination of witnesses or otherwise, and, if necessary, to amend the said record.

5. [*Interpretation of terms.*].—In this Act the term “Sheriff” includes Sheriff-Substitute, and any person appointed by a Sheriff to take evidence on commission according to the present law and practice.

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38 & 39 *Vict.* c. 81.—An ACT to authorise the Payment out of the Consolidated Fund of the United Kingdom of the Salary of an additional Sheriff-Substitute in Scotland ; and for other Purposes.—13th August, 1875.

WHEREAS it is expedient to make further provision for the efficient administration of justice in the county of Lanark and city and royal burgh of Glasgow, and in order thereto it may be necessary to appoint one additional Sheriff-Substitute for such county, and a police magistrate for such city or royal burgh :

And whereas doubts have arisen as to the power of the Commissioners of Her Majesty's Treasury to grant a salary to such one additional Sheriff-Substitute, and it is expedient that such doubts should be removed :

And whereas it is expedient to make other provisions in regard to the appointment and duties of Sheriffs-Substitute in Scotland : Be it therefore enacted :

1. [*Commissioners of Treasury may grant salary to an additional Sheriff-Substitute for Lanarkshire.*].—It shall be lawful to grant such salary, not



exceeding one thousand pounds by the year, and not less than seven hundred pounds by the year, as to the Commissioners of Her Majesty's Treasury may seem meet, to the additional Sheriff-Substitute for the county of Lanark to be appointed after the passing of this Act; and every such salary shall be paid by four equal quarterly instalments out of the Consolidated Fund of the United Kingdom.

2. [*Secretary of State may direct Sheriff-Substitute of one county to act within conterminous county.*].—It shall be lawful for one of Her Majesty's Principal Secretaries of State to direct, if he shall think fit, that the Sheriff-Substitute of one county shall perform the duties of Sheriff-Substitute in a conterminous county; and any such direction shall be equivalent in all respects to a commission from the Sheriff of such conterminous county in favour of the Sheriff-Substitute so directed.

3. [*Appointment of police magistrate for city and royal burgh of Glasgow.*]

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39 & 40 Vict. c. 70.—An ACT to alter and amend the law relating to the Administration of Justice in Civil Causes in the ordinary Sheriff Courts in Scotland, and for other purposes relating thereto.—15th August, 1876.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Preliminary.*

1. [*Short title.*].—This Act may be cited for all purposes as "The Sheriff Courts (Scotland) Act, 1876."

2. [*Commencement and application of Act.*].—This Act shall commence and come into operation on the first day of October one thousand eight hundred and seventy-six, which date is hereinafter referred to as the commencement of this Act. Unless where otherwise expressly provided, this Act shall only apply to civil proceedings in the ordinary Sheriff Court.

3. [*Interpretation of terms.*].—In this Act, unless when there is something in the sense or context repugnant to that construction, the following terms have the meanings hereinafter assigned to them; that is to say—

"Action" includes every civil proceeding competent in the ordinary Sheriff Court:

"Person" includes company, corporation, and firm:

"Sheriff" includes Sheriff-Substitute:

"Sheriff-Clerk" includes Sheriff-Clerk depute, and in Part VIII. of this Act means Commissary Clerk, in those cases in which such office is not abolished:

"Agent" means a law-agent enrolled in terms of the Act of the thirty-sixth and thirty-seventh years of the reign of Her present Majesty, chapter sixty-three :

"Final judgment" means a judgment or interlocutor which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced on all the questions of law or fact raised therein, and although expenses, if found due, have not been taxed, modified, or decerned for.

#### I.—*Sessions.*

4. [*Of the sessions.*].—Each Sheriff shall hold two sessions in each year, the one of which shall be called the winter session, and the other the summer session.

The winter session shall in each year commence on the first day of October or the first ordinary Court-day thereafter, and shall end on the last ordinary Court-day in March ; but it shall be lawful for the Sheriff to adjourn the Court at Christmas time for a period not exceeding fifteen days.

The summer session shall commence on the first day of May or the first ordinary Court-day thereafter, and shall end on the last ordinary Court-day in July.

5. [*Court-days in vacation.*].—The Sheriff shall before the termination of each winter session appoint at least one Court-day during the spring vacation for the despatch of civil business ; and shall before the termination of each summer session appoint at least two Court-days during the autumn vacation for the same purpose.

#### II.—*Petition and Service.*

6. [*Forms of petitions and defences.*].—Every action in the ordinary Sheriff Court shall be commenced by a petition in one of the forms as nearly as may be contained in Schedule (A) annexed to this Act, in which the pursuer shall set forth the Court in which the action is brought, his own name and designation, and the name and designation of the defender, and the prayer of the petition, without any statement whatever of the grounds of action. There shall be annexed to the petition a statement (in the form of an articulate condescendence) of the facts which form the grounds of action, and a note of the pursuer's pleas in law, which condescendence and note of pleas shall be held to constitute part of the petition.

The statement of facts shall be made succinctly and without quotation from documents except where indispensable.

The warrant following upon such petition shall be as nearly as may be in the form contained in the said Schedule (A), which schedule and the notes thereto and directions therein shall be construed and have effect as part of this Act.

7. [*Petitions, &c., may be written or printed.*].—Any petition, warrant, interlocutor, order, or pleading may be written or printed, or partly written and partly printed.

8. [*Induciae of petitions and periods of charge.*].—All petitions may, except as hereinafter provided, proceed on seven days' warning or induciæ where the defender is within Scotland, unless in Orkney and Shetland, or in any other island within Scotland, and fourteen days where he is in Orkney or Shetland or such other island, or is not within Scotland; and in all kinds of execution proceeding upon extracted decrees a seven days' charge shall, except as hereinafter provided, be competent and sufficient:

Provided that,—

- (1.) In any case in which a shorter warning or induciæ or period of charge is by law in force at the commencement of this Act sufficient, such shorter warning or induciæ or period of charge shall continue to be sufficient after the commencement of this Act:
- (2.) It shall be lawful for the Sheriff to shorten the warning or induciæ as he shall see fit in any case which he considers to require special despatch.

9. [*Sheriff's warrants, &c., may be executed edictally.*].—It shall be competent to execute edictally any warrant of citation granted, or charge on an extracted decree pronounced by a Sheriff against any person furth of Scotland, by delivery of a copy thereof at the office of the keeper of edictal citations at Edinburgh, according to the mode established in regard to the execution edictally of citations and charges on warrants of the Court of Session; or by sending to such keeper in a registered post-letter a certified copy of such warrant or charge, of which copy the keeper shall acknowledge the receipt. Every citation or charge so executed edictally shall be recorded in the record of edictal citations in Edinburgh in a separate record of edictal citations or charges against persons furth of Scotland cited or charged upon warrants proceeding from any Sheriff Court therein.

Where the party cited or charged has a known residence or place of business in England or Ireland, a copy of the petition and citation, or of the decree and charge, on fourteen days induciæ, shall be posted in a registered letter to the party at such address by the officer, whose execution shall bear that he has done so. The Sheriff-Clerk shall in all warrants to cite or charge persons furth of Scotland insert a warrant to cite or charge edictally.

10. [*Original petitions to remain in the hands of the clerk; certified copies may be borrowed.*].—Every petition commencing an action shall, after it has been lodged for calling, remain in the hands of the Clerk of Court, unless the Sheriff shall give a special order in writing to the contrary.

In every defended action the pursuer shall forthwith, on the defence being lodged, lodge in process a copy of the petition, and of the warrant thereon, certified as correct by him or his agent in the cause, and which may thereafter be borrowed by any party to the process, and where a warrant has been granted to arrest on the dependence of the action, such

certified copy shall be a sufficient warrant for such arrestment. Separate precepts of arrestment may be issued as heretofore.

11. [*As to proving lost petitions.*—Where a petition or any other pleading is lost or destroyed a copy thereof proved in the action to the satisfaction of the Sheriff before whom the action is depending at the time, and authenticated in such a manner as he shall require, may be substituted, and shall be held equivalent to the original for the purposes of the action.

12. [*Of the service of writs.*—With regard to the service of writs issuing from the Sheriff Courts, the following provisions shall have effect; that is to say—

- (1.) A warrant of citation issuing from any Sheriff Court against any defender who under the provisions of this Act is subject to the jurisdiction of such Sheriff Court, but who has his domicile within the jurisdiction of another Sheriff Court, may be competently executed against such defender within and by an officer of the Sheriff Court of the county in which such defender is domiciled without any indorsation thereof by the Sheriff-Clerk of such last-mentioned county :
- (2.) A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened :
- (3.) The Sheriff may authorise the pursuer to serve of new his petition on any defender who has not entered appearance should it appear to the Sheriff that there was any irregularity in the service on such defender, and the petition, on being so served of new, shall be proceeded with as if there had been no previous service, subject to such order as to expenses as to the Sheriff shall seem just :
- (4.) Service, in ordinary form, on a minor, and on his father as curator at law, or upon a minor and his tutors and curators if known to the pursuer, or, if they are not known, upon the minor himself in ordinary form, and his tutors and curators edictally, shall be good and sufficient service on the minor for every purpose of law :
- (5.) An arrestment shall be ineffectual when the schedule of arrestment shall not have been personally served on the arrestee, unless a copy of such schedule shall also be sent to the arrestee at his last known place of abode through the post by the officer serving the same, who shall certify in his execution that he has done so, stating the address to which the copy has been sent :
- (6.) Service at the market cross is hereby abolished.

13. [*Amendment of petitions in undefended causes.*—In an undefended action in the Sheriff Court any error or defect in the petition whereby the same is commenced may be amended, if the Sheriff shall think such amendment should be allowed ; and such amendment shall be made in writing, either upon the petition, or in a separate paper, signed by the pursuer or his agent ; and the Sheriff may, if he shall see fit, order the amended petition to be served upon any defender who has not entered appearance, and

allow him to enter appearance within such time as shall seem proper : Provided that the expenses occasioned by such amendment shall not be chargeable against any defender ; provided also, that such amendment shall not have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself, or by any person representing him by a title, or in right of a debt contracted by him subsequent to the using of such diligence.

### III.—*Decrees in Absence.*

14. [*Decrees in absence.*].—On the expiration of the induciæ in any action without appearance being entered for the defender, the Sheriff shall, on the motion of the pursuer, grant decree in absence in common form in terms of the prayer of the petition, or subject to such restrictions as may be set forth in a minute written on the petition by the pursuer or his agent, and the Sheriff-Clerk may, seven days after the granting of a decree in absence, issue extract of such decree : Provided as follows :

- (1.) At any time within seven days from the date of such decree it shall be competent for the defender, after consigning in the hands of the Sheriff-Clerk the sum of two pounds sterling, and lodging his defences, to enrol the action in the Sheriff's motion roll ; or when such seven days shall expire in time of vacation, after consignment as aforesaid, to lodge his defences with the Sheriff-Clerk, at any time within such seven days, and thereafter to enrol the action in the said roll against the next ensuing sitting of the Court ; and the action being in the roll, to move the Court to recall the decree in absence ; and when this motion is made, the Sheriff shall pronounce an interlocutor recalling the decree in absence, and allowing the defences to be received ; and the action shall thereupon proceed as if appearance had been made in due time.

The Sheriff shall, unless there seems to him to be any special reason to the contrary, order the consigned money to be paid to the pursuer towards his expenses, and that whether the decree in absence has been recalled or not.

Until the motion for the recall of the decree in absence has been disposed of, the decree shall not be extracted.

- (2.) Should the defender fail to take, within seven days of the date of such decree, the steps hereinbefore provided with a view to having the decree recalled, or to follow out the same, he may obtain the recall of the decree whether extracted or not at any time before implement has followed thereon, or so far as the same shall not have been implemented, by presenting to the Sheriff a written note in which he shall set forth his explanation of his failure to enter appearance in the action and to take within such seven days the

steps hereinbefore provided as aforesaid, or to follow out the same, and producing with such note his defences to the action in which the decree was granted and any documentary evidence he may have in support of such explanation, and consigning the sum of five pounds ; and it shall not be necessary for the pursuer to lodge any answer to the said note, but it shall be lawful for the Sheriff, if satisfied with the explanation aforesaid, to recall the said decree, so far as not implemented, and order payment to the pursuer out of the consigned money of his expenses, including the expense of any charge or diligence upon the decree, or to refuse the note, or do otherwise as he shall think just.

The balance of the consigned money, if any, shall remain in the hands of the Sheriff-Clerk until the Sheriff shall make an order as to the disposal of the same.

- (3.) A note for the recall of a decree under the preceding sub-section shall, after being intimated to the pursuer or his agent, and till refused, operate as a sist of diligence on such decree, and on such decree being recalled, the action on which it was granted shall thereafter proceed in all respects as if appearance therein had been duly made by the defender.
- (4.) Any interlocutor or order recalling, or incidental to the recall, of a decree in absence pronounced under this section shall be final and not subject to review.

15. [*Certain decrees in absence to have effect as decrees in foro.*].—Where a decree upon which a charge is competent shall have been pronounced in absence of a defender after personal service of the petition on such defender, or after the entering of appearance for such defender with his authority, or where a defender shall have been personally charged on such a decree, whether the petition was personally served upon him or appearance made for him with his authority or not, and such decree shall not have been recalled in virtue of the provisions to that effect hereinbefore contained, such decree, upon the lapse of six months after the expiration of a charge upon it not brought under review by suspension, where suspension is competent, shall be entitled to all the privileges of a decree *in foro* against such defender ; and any decree on which a charge is not competent, obtained in absence after such personal service or appearance as aforesaid, shall be final after the lapse of twenty years from its date unless the same shall before that time have been lawfully recalled or brought under review by suspension or reduction.

#### IV.—*Entering Appearance: Records.*

16. [*Procedure where defender enters appearance.*].—Where the defender intends to state a defence, he shall enter appearance, by lodging with the Sheriff-Clerk, before the expiration of the inducia, a notice in the form of Schedule (B) annexed to this Act ; and he shall, on the first Court-day after the expiration of the inducia, or at the latest at an adjourned diet not

later than seven days after the expiration of the inducias, lodge defences with the Sheriff-Clerk. The defences shall be in the form of articulate answers to the condescendence, and shall have appended thereto a note of the defender's pleas in law, and, where necessary, a statement of the facts on which the defender founds in defence.

The statement of facts and answers shall be made succinctly and without quotation from documents except where indispensable.

17. [*Revisal of pleadings not to be allowed as matter of course.*].—Neither party shall be entitled as matter of right to ask for a revisal of his pleadings; but it shall be competent for the Sheriff to allow or to order a revisal of the pleadings upon just cause shown.

18. [*Procedure after pleadings completed, and adjustment of pleadings.*].—If no motion for revisal is made, or if such a motion is refused, or after the lapse of the period within which the revised pleadings fall to be lodged where a revisal has been allowed or ordered, the Sheriff-Clerk shall transmit the process to the Sheriff and the Sheriff shall direct the action to be put to the roll for the first Court-day occurring not less than four days thereafter, and upon such day shall require the parties then to adjust their pleadings, and shall close the record.

19. [*Prorogations of consent abolished.*].—It shall not be competent of consent of parties to prorogate the time for complying with any statutory enactment or order of the Sheriff, whether with reference to the making up and closing of the record, appointing a diet of proof, diet of debate, or otherwise.

20. [*If parties fail to appear in defended action, Sheriff to give judgment.*].—Where in any defended action one of the parties fails to appear by himself or his agent at a diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the Sheriff to proceed in his absence, and unless a sufficient reason appear to the contrary, he shall, whether a motion to that effect is made or not, pronounce decree as libelled or of absolvitor (as the case may require), with expenses; or if all parties fail to appear, he shall, unless a sufficient reason appear to the contrary, dismiss the action.

21. [*Penalty on agent failing to return process borrowed.*].—Where an agent who has borrowed a process, or any part thereof, fails to return the same for any diet in the cause for which the process or the part thereof which may have been borrowed shall be required, it shall be the duty of the Sheriff, whether a motion to that effect is made or not, to impose upon the agent so failing a fine of not less than one pound sterling, which fine shall be payable to the Clerk of Court for behoof of Her Majesty: Provided always, that it shall be competent for the Sheriff who imposed the fine, on cause shown, to recall the order imposing the same, but such order shall not be subject to review.

22. [*Production of documents.*].—At or before the closing of the record each party to an action shall produce all documents specially mentioned in his pleading and which are in his hands. Any other documents, whether in his hands or not, may be produced by him during the proof, but without prejudice to the power of the Sheriff to order their production at any stage of the cause.

It shall be lawful for the Sheriff to order or allow a party at any time before judgment to produce any document which he failed to produce timeously, upon such terms as to payment of expenses and allowing further proof to the other party as to the Sheriff shall seem just.

23. [*Procedure after record closed.*].—The Sheriff shall at the time of closing the record require the parties then to state whether they are ready to renounce further probation; and if they are ready to do so, the parties or their agents shall sign a minute to that effect on the interlocutor sheet; and the Sheriff shall, in the interlocutor closing the record, pronounce a finding that further probation has been renounced, and shall appoint the action to be debated; but when probation is not renounced, the Sheriff, when proof seems necessary, shall at the time of closing the record appoint a diet for proof on an early day, and shall hear the parties or their procurators immediately after such proof is led, unless one adjournment shall be allowed on cause shown for a period not exceeding seven days; and after such debate or hearing, as the case may be, the Sheriff shall pronounce judgment with the least possible delay.

24. [*Amendment of records in defended actions.*].—The Sheriff may at any time amend any error or defect in the record in any action, upon such terms as to expenses and otherwise as to the Sheriff shall seem proper, and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made; but it shall not be competent by such amendment to subject to the adjudication of the Sheriff any larger sum or estate, or any other fund or property, than that specified in the petition, except with the consent of all the parties interested: Provided always, that no such amendment shall have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself, or by any person representing him, by a title, or in right of a debt contracted by him, subsequent to the execution of such diligence.

V.—*Special Actions; Multiplepoundings; Processes of Cessio.*

25. [*Procedure in multiplepoundings.*].—In actions of multiplepounding the following provisions shall have effect:—

- (1.) The party raising the action shall set forth in the petition who is the real raiser of the action:
- (2.) The Sheriff shall, at the first calling of the action, where no defences are stated, or, where defences are stated and repelled, at the first calling thereafter pronounce an order for claims within a short space:
- (3.) Any of the parties whose claims in the action depend upon the same grounds may state their claims in the same paper; and may, where their claims are opposed and yet they are agreed on the facts, make their averments in the form of a joint case, appending thereto their respective claims and pleas in law:



- (4.) When the parties who shall appear and claim an interest in the fund *in medio* shall have lodged their claims, or had opportunity allowed them for doing so, the Sheriff shall appoint the parties or their agents to meet him ; and shall at such meeting allow each party to adjust his own part of the record, and to meet the averments of the other claimants so far as necessary ; and the procedure at such meeting, and in the after progress of the action, shall be as nearly as may be the same as is hereinbefore provided with reference to ordinary actions after defences have been lodged.

26. [*Cessio bonorum*.]—From and after the passing of this Act the following provisions shall have effect with respect to processes of *cessio bonorum* :

- (1.) All such actions shall be instituted in the Sheriff Court only :
- (2.) A debtor being insolvent and under a charge to pay any civil debt on which charge imprisonment may follow ; or against whom a decree for payment of civil debt, not requiring a charge, has been granted, on which imprisonment may follow ; shall, being prepared to surrender his whole means and estate to his creditors, be entitled to raise an action in the Sheriff Court, praying for interim protection and for decree of *cessio bonorum* under the Act of the sixth and seventh years of the reign of King William the Fourth, chapter fifty-six, as amended by this Act, and the production of the said charge, or a certificate of the granting of such a decree as aforesaid, under the hand of the Clerk of the Court which granted the same, shall be a sufficient title on which to raise such action :
- (3.) It shall be lawful for the Sheriff—
  - (a.) At once to grant interim protection against imprisonment for civil debt to the applicant on his finding caution, for such amount as the Sheriff may deem reasonable, for his appearance at all diets of the process :
  - (b.) When the applicant is in prison to grant warrant for his interim liberation, after forty-eight hours' notice to the incarcerating creditor or his known agent of the motion for liberation, and on caution being found for such amount as the Sheriff may deem reasonable for the applicant's appearance at all diets of the process, and also binding the cautioner to present the applicant at the prison for re-incarceration should the *cessio* be refused or the interim warrant recalled :
- (4.) Judgments or interlocutors pronounced in such actions shall be reviewed on appeal in the same form and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment or interlocutor pronounced in any other action in the Sheriff's ordinary Court ; but warrants of interim protection or interim liberation shall become effectual when granted, and remain good till recalled :

- (6.) Any notices or intimations required by law to be given to creditors shall be sufficiently given in the case of creditors furth of Scotland if given to their known agents or mandatories in Scotland.

#### VI.—*Appeals.*

27. [*What appeals competent before final judgment.*].—The following, and no other, appeals to the Sheriff against judgments or interlocutors of the Sheriff-Substitute shall be competent: that is to say, an appeal against a final judgment or an appeal against an interlocutor—

- (1.) Granting or refusing interdict, interim or final; or,
- (2.) Granting interim decree for money, or making an order *ad factum præstandum*, or sisting an action; or,
- (3.) Allowing, or refusing, or limiting the mode of proof; or,
- (4.) Against which the Sheriff-Substitute, either *ex proprio motu*, or on the motion of a party, grants leave to appeal.

28. [*Note of appeal against judgment of the Sheriff-Substitute.*].—An appeal to the Sheriff may, when competent, be taken by a note of appeal written at the end or on the margin of the interlocutor sheet containing the judgment or interlocutor appealed from, within seven days after the date of such judgment or interlocutor, in the following or similar terms:

“The pursuer [*or defender or other party*] appeals to the Sheriff:”

The note shall be signed by the appellant or his agent, and shall bear the date on which it is signed. If the interlocutor sheet is not in the hands of the Sheriff-Clerk (which fact shall be certified by him) the note may be written, signed, and dated as aforesaid on a separate paper, prefixing merely the name of the cause and the date of the interlocutor appealed from, and having annexed a certificate by the Sheriff-Clerk to the effect aforesaid:

On an appeal being so taken, the Sheriff-Clerk shall forthwith transmit the process to the Sheriff, whose duty it shall be to determine what shall be the procedure in the appeal; provided as follows:

- (1.) The Sheriff may fix a diet for hearing the parties orally on the appeal, and may hear them accordingly, or may order a reclaiming petition and answers to be lodged, and prescribe the times for lodging the same; but it shall not be competent for him in any case both to order a reclaiming petition and answers and an oral hearing:
- (2.) If both parties concur in asking the Sheriff to dispose of the appeal without either ordering a reclaiming petition and answers or an oral hearing, the Sheriff may, if he think fit, dispose of the same accordingly:
- (3.) It shall be competent for the Sheriff, where the action is before him on appeal on any point to open the record *ex proprio motu*, if the record shall appear to him not to have been properly made up, or to allow further proof.

29. [*Effect of appeal.*].—Such appeal shall be effectual to submit to the review of the Sheriff the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Sheriff to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the Sheriff; and an appeal may be insisted in by any other party in the cause, other than the appellant, in the same manner and to the like effect as if it had been taken by himself.

30. [*How reclaiming petitions, &c., shall be drawn.*].—All reclaiming petitions and answers shall be drawn without quotation from the interlocutors, notes thereto, proof, or process, except when such quotation is indispensable.

31. [*Power to regulate possession, &c., pending appeal.*].—A Sheriff or Sheriff-Substitute shall have power, notwithstanding an appeal, to regulate all matters relating to interim possession, to make any order for the preservation of any property to which the action relates, or for the sale of such property when perishable, or for the preservation of evidence, according to his discretion, having a just regard to the interests of the parties as they may be affected by the decision of the Sheriff on the appeal.

An interim interdict, although appealed against, shall be binding till recalled.

An appeal shall not prevent the immediate execution of a warrant of sequestration for rent, or a warrant to take inventories, or place effects in custody *ad interim*, or other warrants of interim preservation.

32. [*When judgment, &c., may be extracted if no appeal.*].—Notwithstanding anything contained in section sixty-eight of the Court of Session Act, 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court, may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against; and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of fourteen days from the date thereof, unless the Sheriff or Sheriff-Substitute who pronounced the same shall allow the extract to be sooner issued.

33. [*Final judgments may be appealed within one month, if not sooner extracted or implemented.*].—Notwithstanding the provisions of this Act relating to appeals, an appeal to the Sheriff may be competently taken against any final judgment pronounced by a Sheriff-Substitute at any time within one month of its date, if the same shall not have been sooner extracted or implemented.

34. [*Correction of accidental errors in judgments.*].—At any time before the transmission of a process in which an appeal has been taken to the Sheriff, the Sheriff-Substitute may competently correct any merely clerical or accidental error in his judgment; and in like manner the Sheriff may competently correct any such error in a judgment pronounced by him before extract thereof or appeal therefrom to the Court of Session.

VII.—*The Commissary Courts abolished.*

35. [*Commissary Courts abolished, and powers transferred to Sheriffs.*—From and after the commencement of this Act, the Commissary Courts in Scotland shall be, and the same are hereby, abolished, and the whole powers and jurisdictions of the Commissary Court in each commissariat shall be, and the same are hereby transferred to the Sheriff in office at the commencement of this Act as the commissary of such commissariat, who shall thereafter, and his successors in office as Sheriff, possess and exercise the whole of the said powers and jurisdictions in all respects: Provided that it shall still be competent and proper to affix the seal of office of a commissariat to all documents to which it would have been competent and proper to affix the same before the commencement of this Act.

36. [*Office of commissary-clerk in certain cases abolished.*—In every case in which in any sheriffdom the offices of Sheriff-Clerk and of commissary-clerk shall, at the commencement of this Act, be united in the same person, who is remunerated by salary for discharging the duties of both offices, the office of commissary-clerk shall be as from the said date, and the same is hereby, abolished; and the whole powers and duties of the office of commissary-clerk shall be as from the said date, and the same are, hereby transferred to the office of Sheriff-Clerk; and the Sheriff-Clerk shall thereafter, and his successors in office as Sheriff-Clerk, possess and exercise the whole of the said powers, and perform the whole of the said duties.

37. [*Vacancies in office of commissary-clerk not to be supplied.*—No vacancy existing at the commencement of this Act, or which may thereafter occur, in the office of a commissary-clerk, except the office of the commissary-clerk of Edinburgh, shall be supplied.

38. [*All commissary-clerks, except in Edinburgh, to be abolished on vacancies occurring.*—In every case of a vacancy occurring after the commencement of this Act in the office of commissary-clerk in any commissariat in Scotland, except the commissariat of Edinburgh, such office shall be, as from the date of the occurrence of such vacancy, abolished, and the whole powers and duties of the office of commissary-clerk shall be transferred to the office of the Sheriff-Clerk of the county, and the Sheriff-Clerk of the county shall thereafter, and his successors in office as Sheriff-Clerk, possess and exercise the whole of the said powers, and perform the whole of the said duties.

39. [*Commissary-clerks continuing in office to perform the duties in the Sheriff-Court.*—From and after the commencement of this Act, every commissary-clerk whose office shall not be forthwith abolished under the provisions of this Act shall perform, in the Sheriff Court of the county, all the duties and exercise all the powers heretofore performed and exercised by him in the Commissary Court; provided that such commissary-clerk shall not be disabled from acting as a procurator in the Sheriff Court, except in causes in which he acts as Clerk of Court.

40. [*Provisions to have effect on the abolition of the office of commissary-clerk.*]

—On the office of commissary-clerk being in any case abolished under the provisions hereinbefore contained, the following provisions shall have effect :

- (1.) All records, books, documents, papers, and things belonging to the office of the commissary-clerk, or in the possession of any clerk or officer of that office as such, shall be forthwith transferred to the office or offices of the Sheriff-Clerk of the county.
- (2.) It shall be lawful for the Lords Commissioners of Her Majesty's Treasury to regulate the office of such Sheriff-Clerk, and out of moneys to be voted by Parliament to award him such salary or personal remuneration, together with such allowances for clerks and office expenses, as shall seem just, having regard to the additional duties imposed upon him, and to the increased expenses of his office consequent on the transfer thereto of the duties of the office of commissary-clerk.
- (3.) The Sheriff-Clerk shall account for and pay to the Queen's and Lord Treasurer's Remembrancer, on behalf of Her Majesty, all fees received in his office in connection with the new business by this Act transferred to his office.

VIII.—*Amendment of Law as to Confirmation of Executors.*

41. [*Note in confirmation by Sheriff-Clerk or commissary-clerk that deceased died domiciled in Scotland substituted for certified copy interlocutor by the Sheriff-Commissary and to have like effect.*]—Where, under the provisions of the ninth and subsequent sections of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, intituled “An Act to amend the law relating to the confirmation of executors in Scotland, and to extend over all parts of the United Kingdom the effect of such confirmation and of grants of probate and administration,” it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the Sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the Sheriff-Clerk to insert in the confirmation, or to note thereon and sign a statement that the deceased died domiciled in Scotland ; and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland ; and sections twelve and thirteen of the said Act, so far as they make it a condition of the sealing of a confirmation in the principal Court of Probate in England or in the Court of Probate in Dublin, that the copy of the confirmation provided to be deposited with the registrar shall be accompanied by such a certified copy interlocutor, are hereby repealed.

42. [*Extension of the provisions of sections 12 and 13 of 21 & 22 Vict. c. 56.*]—When an additional inventory has been given in and recorded and

confirmation granted in a Sheriff Court in Scotland of estate situated in England or Ireland of a person who died domiciled in Scotland, and the additional confirmation shall be produced in the principal Court of Probate in England or in the Court of Probate in Dublin, as the case may be, and a copy thereof deposited with the registrar of the Court, such additional confirmation shall be sealed with the seal of the Court and returned to the person producing the same, and that whether the original confirmation shall have been sealed with the seal of the Court or not, and although the additional inventory confirmed shall not contain any estate of the deceased situated in Scotland, and such additional confirmation when so sealed shall thereafter have the same force and effect as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed.

43. *Confirmation of Scotch estate with note of trust funds in England or Ireland to be sealed in Probate Courts as if it contained English or Irish estate of the deceased.*—When any confirmation or additional confirmation of personal estate situated in Scotland, which shall contain or have appended thereto and signed by the Sheriff-Clerk a note or statement of funds in England or Ireland, or both, held by the deceased in trust, shall be produced in the principal Court of Probate in England or in the Court of Probate in Dublin, as the case may be, such confirmation shall be sealed with the seal of such Court in the same manner as is provided by sections twelve and thirteen of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, as amended by this Act, with respect to sealing confirmations which include personal estate situated in England or Ireland respectively; and such confirmation shall thereafter have the like force and effect in England and Ireland with respect to such funds as if probate or letters of administration, as the case may be, had been granted by the Court of Probate in which it had been sealed; and such note or statement may be inserted or appended as aforesaid by the Sheriff-Clerk, provided the same shall have been set forth in any inventory which has been recorded in the books of the Court of which he is clerk.

44. [*Schedule (C) of 21 & 22 Vict. c. 56 hereby repealed, and new form of intimation, &c.*].—The Sheriff-Clerk shall, after a petition for the appointment of an executor has been intimated by him as provided by section four of the Act passed in the twenty-first and twenty-second years of the reign of Her present Majesty, chapter fifty-six, and after receiving the certified copy of the printed and published particulars therein set forth, forthwith certify these facts on the petition in the following or similar terms: "Intimated and published in terms of the statute," which certificate (in lieu of the certificate in the form of Schedule (C) annexed to the said Act, which Schedule (C) is hereby repealed) shall be dated and signed by him, and shall be sufficient evidence of the facts therein set forth: Provided always, that special intimation shall be made to all executors already decerned or confirmed to a deceased person of any subsequent petition for the appoint-

ment of an executor which may be presented with reference to the personal estate of the same deceased person.

45. [*A calendar of confirmations and inventories to be published annually.*—It shall be the duty of the commissary-clerk of Edinburgh, on or before the thirty-first day of December one thousand eight hundred and seventy-seven, and on or before the thirty-first day of December in every year thereafter, to prepare and issue a printed calendar containing a list or register, alphabetically arranged, of all confirmations granted, and of all inventories given in, in cases in which from any cause confirmation shall not have been required in Scotland, in the year ending on the thirty-first day of December immediately preceding, specifying in each case the name and designation, and the place and date of death of the person deceased; whether he died testate or intestate; the names and designations of his executors; date of confirmation or recording of inventory; the date of the will or deed, if any; and where and of what date the same was registered; and the value of the estate: Provided as follows:

- (1.) It shall be the duty of every Sheriff-Clerk to furnish to the commissary-clerk of Edinburgh on or before the fifteenth day of February one thousand eight hundred and seventy-seven, such a list or register of confirmations granted, and inventories given in, within the sheriffdom of which he is such clerk (with all the particulars above specified) in the year ending on the thirty-first day of December immediately preceding; and thereafter quarterly, on or before the first days of February, May, August, and November in each year, to furnish to the commissary-clerk of Edinburgh such a list or register, with such particulars as aforesaid, of all confirmations and inventories granted or given in within such sheriffdom in the quarters ending on the thirty-first day of December, the thirty-first day of March, the thirtieth day of June, and the thirtieth day of September immediately preceding respectively:
- (2.) A copy of every such calendar issued shall be sent by the commissary-clerk of Edinburgh to every Sheriff-Clerk in Scotland, who shall keep the same in his office open for the inspection of the public on payment of such fee as may be fixed by Act of Sederunt, which the Court of Session are hereby authorised and required to pass:
- (3.) A copy of every issue of such calendar shall also be sent to the Lord Clerk Register and to the registrars in the Probate Courts of London and Dublin:
- (4.) The cost of preparing and printing and issuing such calendar and of furnishing copies thereof to the persons to whom they are herein directed to be sent shall be defrayed out of moneys to be voted by Parliament.

#### IX.—Miscellaneous Provisions.

46. [*A person shall, in certain cases, be subject to the jurisdiction of the*

*Sheriff within whose territory he has a place of business, though domiciled in another county.*—A person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he shall be cited to appear in such action either personally or at his place of business; it shall however be in the power of the Sheriff aforesaid, upon sufficient cause shown, to remit any such action to the Court of the defender's domicile in another sheriffdom.

47. [*Actions of forthcoming and multiplepoinding to be competent before the Sheriff to whose jurisdiction the arrestee or the holder of the fund is amenable.*—Any person entitled to raise an action of forthcoming or of multiplepoinding may competently raise the same in any Sheriff Court to whose jurisdiction the arrestee or the holder of the fund or subject *in medio*, as the case may be, is subject, although the common debtor may not reside within such jurisdiction; and the warrant of citation issuing from such Court may be competently executed as hereinbefore provided against the common debtor or other defender in any such action; provided that the citation shall require the person cited to appear at a Sheriff Court of the county in which the action is brought, by lodging a notice of appearance, or defence, or claim, in the hands of the Clerk of Court within seven days, or fourteen days, as the case may be, after the date of citation.

48. [*Repeal of section 15 of Act 16 & 17 Vict. c. 80.*—Section fifteen of the Act passed in the sixteenth and seventeenth years of the reign of Her present Majesty, chapter eighty, is hereby repealed.

49. [*Actions falling asleep may be wakened of consent, and after certain procedure.*—Any action in a Sheriff Court in which no interlocutor shall have been pronounced during the period of year and day shall be held to have fallen asleep; but the following provisions shall have effect in regard to the wakening thereof—

(1.) Where any cause shall have fallen asleep as aforesaid, it shall be competent to the Sheriff to pronounce an interlocutor wakening the cause on the agents for the whole parties subscribing a minute on the interlocutor sheet to the following or the like effect, "We, the agents for the parties, consent to the cause being wakened and proceeded with;" and on such interlocutor being pronounced, the cause may thereafter be proceeded with as wakened accordingly:

(2.) Where any cause shall have fallen asleep as aforesaid, and where any of the parties desires to have it wakened and proceeded with, it shall be competent for such party to enrol the cause and to lodge a minute craving a wakening of the cause; and the Sheriff may thereupon direct intimation of such minute to be made to the known agents of the other parties in the cause or to such parties themselves; and shall direct intimation to be made on the walls of the Court in such manner as shall seem fit for seven days; and



where said parties have no known agents or are themselves furth of Scotland, the Sheriff shall also appoint edictal intimation thereof to be made by publication in the record of edictal citations ; and on the expiration of seven days from the date of such intimation or from the latest date thereof, and on a certificate being lodged in process under the hand of the agent applying for the wakening, certifying that he has duly intimated the minute in terms of the Sheriff's interlocutor, the Sheriff may pronounce an interlocutor holding the cause as wakened, and the same may thereafter be proceeded with as wakened accordingly.

The provisions of this section shall not apply to any action which at the commencement of this Act stood dismissed in consequence of six months having elapsed without any proceeding having been taken therein, but may be applied to any action where a less period than six months had at the commencement of this Act elapsed without any proceeding having been taken therein.

50. [*Sheriff may sign judgment when furth of his county.*].—It shall be lawful for any Sheriff to pronounce and sign any interlocutor, judgment, or decree [when furth of his sheriffdom ; and every such interlocutor, judgment, or decree shall have all the like force and effect as if pronounced and signed by the Sheriff while within the limits of his sheriffdom, but shall bear date at the seat of the Court as of the day on which it is received there by the Sheriff-Clerk, and entered by him in the books of Court.

51. [*Provision for the case of a Sheriff being disabled or necessarily absent.*].—It shall be lawful for one of Her Majesty's principal Secretaries of State, on an application made by or on behalf of any Sheriff for leave of absence on account of temporary illness or other reasonable cause, to grant such leave of absence for such period as he shall deem proper, and to appoint some other person, who shall be a Sheriff of some other sheriffdom, or shall be an advocate of not less than five years' standing, to act as interim Sheriff in the place and during the absence of such Sheriff ; and, on any such interim appointment being made, to fix what proportion of the salary of the Sheriff shall be paid to the interim Sheriff, and to certify the same in writing ; and such certificate shall, when presented in Exchequer to the Queen's and Lord Treasurer's Remembrancer, be a sufficient warrant to him for payment to such interim Sheriff of the proportion of the Sheriff's salary therein mentioned.

In this section the word "Sheriff" does not include Sheriff-Substitute.

Any interim Sheriff appointed under this section shall have and exercise all the powers and privileges, and perform all the duties of the Sheriff, and his acts, orders, and judgments shall have the same force and effect as if done, made, or pronounced by the Sheriff.

A Sheriff appointed to be interim Sheriff under this action shall not, by accepting such interim appointment, vacate his office as Sheriff.

52. [*Mode of disposing of summary applications where no procedure provided*

*by statute.*—In every case of an application, whether by appeal or petition, made to the Sheriff under any Act of Parliament which provides, or according to any practice in the Sheriff Court which allows, that the same shall be disposed of in a summary manner in the Sheriff Court without record of the defence or evidence, and without the judgment being subject to review, but which does not more particularly provide in what form the same shall be heard, tried, and determined, the application may be by petition in one of the forms, as nearly as may be, contained in Schedule (A) annexed to this Act, and the Sheriff shall appoint the application to be served and the parties to be heard at a diet to be fixed by him, and shall at that diet, or at an adjourned diet summarily dispose of the matter after proof led when necessary, and hearing parties or their procurators thereon, and shall give his judgment in writing.

53. [*Additions to salaries of Sheriffs of united counties to be paid out of Consolidated Fund.*—Notwithstanding anything contained in section eleven of the Act of the thirty-third and thirty-fourth years of the reign of Her present Majesty, chapter eighty-six, any additions made in terms of the recited section to the salaries of the Sheriffs of united counties shall, instead of being paid out of moneys to be provided by Parliament for that purpose, be paid in the manner provided by the Act passed in the seventeenth and eighteenth years of the reign of Her present Majesty, chapter ninety-four, Schedule (A).

54. [*Court to make Acts of Sederunt.*—The Court of Session may from time to time make such regulations by Act of Sederunt as shall be necessary for carrying into effect the purposes of this Act; and for regulating the forms of petitions, and modes of procedure and of pleadings; and generally the practice of the Sheriff Courts in respect of the matters to which the Act relates; and for regulating the fees of Court, with the concurrence of the Commissioners of the Treasury, and also for regulating the fees of the agents practising before the said Courts, and of shorthand writers appointed to take down proofs, and, so far as may be found expedient, for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this Act relates, or any of them, and for regulating the place or places at which in each county the business heretofore conducted in the Commissary Court thereof shall be hereafter conducted in the Sheriff Court thereof, and the place or places and manner in which the records, books, documents, papers, and things connected therewith should be hereafter kept; and may also repeal or alter the provisions of any Act of Sederunt relating to any of the matters hereinbefore specified as may be inconsistent with such new regulations; and for that purpose the Court of Session may meet during vacation as well as during session; and in preparing such Act of Sederunt the Court may take the assistance of any six Sheriffs and Sheriffs-Substitute whom they may select: Provided that every such Act of Sederunt shall, within one month after the date thereof, be transmitted by the Lord President of the Court of Session to one of Her Majesty's principal

(g.) Or, To ordain the defender to produce a full account of his intrusions as [*here state the character in which the defender is accountable as factor or otherwise*], and to pay to the pursuer the sum of £                      or such other sum as may appear to be the true balance due by him ; and failing his producing such account, to ordain the defender to pay                      .

(h.) Or, To find that he is holder of £ [or state the nature of the fund or subject in medio], which is claimed by the defenders, and that he is only liable in once and single payment [or delivery] thereof, and is entitled on payment [or delivery, or consignment], to be exonerated thereof, and to obtain payment of his expenses; and that decree should issue in favour of the party or parties who shall be found to have best right to the fund [or subject] in medio. The real raiser hereof is

## CONDESCENDENCE.

[State articulately the facts which form the grounds of action.]

## NOTE OF PLEAS IN LAW.

[State them articulately.]

## WARRANT.

(Place and date.) The Sheriff of the county of grants warrant [to cite the defender, in the manner and upon the inducia, as the case may be] and ordains the defender, if he intends to show cause why the prayer of the petition should not be granted, to lodge in the hands of the Clerk of Court at a notice of appearance within the inducie of citation hereon, under certification of being held as confessed, and grants warrant [to arrest on the dependence] [meantime grants interim interdict as craved], [meantime sequestrates and grants warrant to officers of Court to inventory and secure as craved], [or as the case may be].

NOTE.—In all these writs, where interest and expenses, or either, are sought, they must be prayed for.

Every writ shall be signed by the pursuer or his law-agent, who shall add his address.

The warrant may be signed by the Sheriff-Clerk, unless interim interdict, sequestration, or other order, not being an order for citation or warrant to arrest, is contained in the warrant, in which case the warrant shall be signed by the Sheriff or Sheriff-Substitute; and a mere warrant of citation or arrestment may competently be signed by the Sheriff or Sheriff-Substitute.

## SCHEDULE (B).

IN THE SHERIFF COURT OF SHIRE AT

## NOTICE OF APPEARANCE.

In the action *A B* [design him] against *C D* [design him].  
*C D*, defender, enters appearance to defend said action.

*C D*, defender.

[Or] *E*, agent for defender.

**ACT OF SEDERUNT anent Procurators for the Poor in Sheriff Courts.—Edinburgh, 16th January, 1877.**

The LORDS OF COUNCIL AND SESSION hereby ENACT AND ORDAIN as follows :—

1. The 134th section of the Act of Sederunt, 10th July, 1839, is hereby repealed.

2. As parties from poverty are sometimes unable to pursue or defend a civil or criminal action, and it is therefore proper to appoint procurators for the poor, it shall be lawful for each Sheriff to issue an order annually, at such time in each year as he may think fit, appointing the law-agents entered on the roll of his Court (or, in the case of a sheriffdom consisting of more than one county, or of a county or counties divided into districts having separate local Courts, the law-agents in each of such counties or districts) to meet at a time and place to be named in such order, for the purpose of nominating one or more of their number to act as procurators for the poor for a period not exceeding one year in each of the counties or districts within his jurisdiction—the number to be nominated being specified in the order; and notice of such order shall be given by a copy being affixed on the walls of the Sheriff-Court house or Sheriff-Court houses and the Sheriff-Clerk's offices within the sheriffdom.

3. The law-agents at the said meeting shall, by a majority of the votes of those present, nominate the number specified by the Sheriff of the said law-agents on the roll to act as procurators for the poor during the time above specified, and shall cause the names of those so nominated to be forthwith reported to the Sheriff, who shall have power to confirm said nominations in whole or in part, or to decline to do so.

4. In the event of the law-agents failing to meet as appointed, or to report forthwith the nomination made, or of the Sheriff declining to confirm

the nominations or any of them, he shall either himself forthwith appoint a law-agent or law-agents to act as procurators for the poor; or shall, in his option, appoint another meeting of the law-agents, to be held at such place and time as he may think fit; and in the event of the law-agents failing to meet in terms of the latter appointment, or in the event of the meeting failing to make a nomination of procurators for the poor satisfactory to the Sheriff, and reporting the same forthwith to the Sheriff, he shall himself appoint a law-agent or law-agents to act as procurators for the poor in each of the counties or districts within his jurisdiction.

5. The Sheriff-Clerk shall immediately give notice to the several persons of their appointment.

6. The procurators appointed as aforesaid shall be bound, during the time for which they are so appointed, to act as procurators for the poor, including such poor persons as may be charged criminally to appear at any circuit Court; and it shall be their duty to forward to the agent for the poor at the circuit town such precognitions as they may be able to take, or such information as they may be able to obtain.

7. It shall be part of the duty of every procurator for the poor, on the requisition of any other procurator for the poor of another district, to attend proofs by commission, and to forward such precognitions of witnesses within the district, county, or sheriffdom to which he is attached as aforesaid as he may be able to take, or such information as he may be able to obtain.

And the Lords APPOINT this Act of Sederunt to be inserted in the Books of Sederunt, and to be printed and published in the usual form.

JOHN INGLIS, *J.P.D.*

40 & 41 *Vict.* c. 50.—An ACT to amend the Law in regard to the appointment of Sheriffs-Substitute and Procurators Fiscal in *Scotland*; to extend the jurisdiction of and amend the procedure in the Sheriff-Courts of *Scotland*; and for certain other purposes connected therewith.—(14th August, 1877.)

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*]—This Act may be cited for all purposes as the Sheriff-Courts (*Scotland*) Act, 1877.

2. [*Commencement of Act.*]—Except in so far as otherwise expressly provided, this Act shall commence and take effect on and immediately after the first day of October, one thousand eight hundred and seventy-seven.

3. [*Appointment of salaried Sheriffs-Substitute vested in Her Majesty.*]—From and after the passing of this Act the right of appointing to the salaried office of Sheriff-Substitute, heretofore belonging to Sheriffs, shall be transferred to, vested in, and exercised by Her Majesty, her heirs and successors, on the recommendation of one of Her Majesty's principal Secretaries of State.

4. [*Qualification of Sheriffs-Substitute, 6 Geo. IV. c. 23, § 9, repealed, 36 & 37 Vict. c. 63.*]—The ninth section of the Act passed in the sixth year of His Majesty George the Fourth, chapter twenty-three, is hereby repealed; and in lieu thereof it is enacted as follows: From and after the passing of this Act no person shall be appointed to the office of salaried Sheriff-Substitute who shall not be an advocate or a law-agent, within the meaning of the Act passed in the thirty-sixth and thirty-seventh years of the reign of Her present Majesty, chapter sixty-three; provided always, that such advocate or law-agent shall not be of less than five years' standing in his profession.

5. [*Tenure of office of salaried Sheriffs-Substitute and Procurator Fiscal.*]—No person holding the office of Sheriff-Substitute or Procurator Fiscal at the passing of this Act, and receiving salary on that account, and no person who may hereafter be appointed to the office of salaried Sheriff-Substitute or Procurator Fiscal by virtue of the provisions of this Act, shall be removable from office, except by one of Her Majesty's principal Secretaries of State, for inability or misbehaviour, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.

6. [*Appointment of Procurator Fiscal vested in Sheriffs, with approval of Secretary of State.*]—From and after the passing of this Act the appointment of Procurators Fiscal shall be made by the Sheriff with the approval of one of Her Majesty's principal Secretaries of State, and any Procurator Fiscal so appointed, and any Procurator Fiscal holding office at the passing of this Act (save in so far as hereinafter expressly provided) shall not be remov-

able from office except in the manner provided in the fifth section of this Act: Provided always, that no appointment of any Procurator Fiscal, whether made before or after the passing of this Act, shall fall by reason of the Sheriff ceasing to hold office by reason of death, resignation, or otherwise. The appointment of any person to act as Procurator Fiscal *ad interim* or in the absence of the Procurator Fiscal in any Sheriff-Court shall cease and determine from and after the commencement of this Act.

7. [*Procurator Fiscal may appoint depute with consent of Lord Advocate and Sheriff.*].—Except as hereinbefore provided, no Sheriff shall have power, after the passing of this Act, to nominate or appoint any person to perform the duties of Procurator Fiscal; but it shall be lawful for a Procurator Fiscal, with the leave of the Lord Advocate and Sheriff expressed in writing, to grant a deputation to one or more fit persons to be named in such writing for whose actings he shall be responsible, to sign writs, to appear in Court, and to conduct prosecutions and inquiries in his name and on his behalf. In the event of a vacancy in the office of Procurator Fiscal, any depute or deputies appointed in terms of this section shall have and discharge all the powers, privileges, and duties of a Procurator Fiscal until such vacancy is filled up.

8. [*Sheriff's jurisdiction extended to certain questions of heritable right or title, &c.*].—The jurisdictions, powers, and authorities of the Sheriffs and Sheriffs-Substitute of Scotland shall be and the same are hereby extended to,—

- (1.) All actions (including actions of declarator, but excluding actions of adjudication, save in so far as now competent, and excluding actions of reduction) relating to a question of heritable right or title, where the value of the subject in dispute does not exceed the sum of fifty pounds by the year, or one thousand pounds value:
- (2.) Actions of declarator for the purpose of determining any question relating to the property in, or right of succession to, moveables, where the value of the subject in dispute does not exceed the sum of one thousand pounds:
- (3.) Actions of division of commonry, and division, or division and sale, of common property, where the value of the subject in dispute does not exceed the sum of fifty pounds by the year, or one thousand pounds value:

Provided that the Act of the Parliament of Scotland passed in the year one thousand six hundred and ninety-five, intituled “Act concerning the dividin of commonities,” shall for the purposes of this Act, and subject to the limitations hereof, be read and construed as if it conferred jurisdiction upon Sheriffs and Sheriffs-Substitute in the same manner as it confers jurisdiction on the Court of Session:

- (4.) Any action against a foreigner, provided—

- (1.) That such action would be competent in a Sheriff Court against a Scotsman subject to the jurisdiction thereof; and
- (2.) That a ship or other vessel belonging to such foreigner, or of

which he is part owner or master, shall have been arrested within the sheriffdom.

Actions relating to questions of heritable right or title, or to division of commonities, or division, or division and sale, of common property, raised in a Sheriff Court, shall be raised in the Sheriff Court of the county in which the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall be subject in such action to the jurisdiction of the Sheriff and Sheriff-Substitute of such county.

Nothing herein contained shall derogate from any jurisdiction, power, or authority now possessed by the Sheriffs and Sheriffs-Substitute of Scotland.

9. [*Provisions as to actions, &c., made by this Act competent in the Sheriff-Court.*—In regard to every action brought under the preceding section in the Sheriff Court, the following provisions shall have effect; that is to say—

- (1.) If a defender shall, at any time before an interlocutor closing the record is pronounced in the action, or within six days after such an interlocutor shall have been pronounced, lodge a note in the process in the following or similar terms; that is to say—

“The defender prays that the process may be transmitted to  
“the Court of Session.

“[*Date*] [Signed by the Defender  
or his Law Agent.]”

it shall be the duty of the Sheriff-Clerk forthwith to transmit the process to the Keeper of the Rolls of the First Division of the Court of Session, who shall, under the directions of the Lord President of the Court, mark on the petition the division and the Lord Ordinary before whom it shall depend, and shall transmit the process to the depute-clerk officiating at the bar of such Lord Ordinary; and the process having been so transmitted shall thereafter proceed before the Court of Session as nearly as may be as if it had been raised in that Court:

- (2.) The Court of Session or either Division thereof or any Lord Ordinary therein may, if of opinion that the action might have been properly tried in the Sheriff Court, allow the defender who removed the action to the Court of Session, in the event of his being successful therein, such expenses only as they may consider that he would have been entitled to if successful in the action in the Sheriff Court:
- (3.) The provisions of any Act of Parliament excluding appeal to the Court of Session in respect of the value of a cause depending in the Sheriff Court shall not apply to actions brought therein under the preceding section.

10. [*How value of estate shall be determined.*—In any case of question as to the value of the subject in dispute in any action brought in a Sheriff Court under the provisions of this Act extending the jurisdiction of the Sheriffs, the Sheriff or Sheriff-Substitute shall (in such way as he may think expedient) inquire into and determine the value, and his determination shall be final as regards the competency of bringing the action in the Sheriff Court.



If it shall appear to the Sheriff or Sheriff-Substitute, as the case may be, that the value exceeds the amount specified by this Act, he may dismiss the action, with or without expenses, as he shall see fit, or on the motion of the pursuer may, if he shall see fit, order the Sheriff-Clerk to transmit the process to the Keeper of the Rolls of the First Division of the Court of Session, who shall, under the directions of the Lord President of the Court, mark on the petition the Division and the Lord Ordinary before whom it shall depend, and shall transmit the process to the depute clerk officiating at the bar of such Lord Ordinary, and the process having been so transmitted shall thereafter proceed before the Court of Session as nearly as may be as if it had been raised in that Court.

11. [*Deed may be set aside by exception.*].—When in any action competent in the Sheriff Court a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof: Provided always, that if any objection to a liquid document of debt, now maintainable only by way of reduction, shall be maintained by way of exception, the objector shall find such caution, or make such consignment, as the Sheriff or Sheriff-Substitute may direct.

12. [*Abolition of fees to Sheriffs and Sheriffs-Substitute.* 23 & 24 Vict. c. 33. 8 & 9 Vict. c. 19.].—From and after the passing of this Act, the seventh section of "The Bankruptcy (Scotland) Amendment Act, 1860," and so much of the fifty-first section of "The Lands Clauses Consolidation (Scotland) Act, 1845," as provides for the payment of remuneration to Sheriffs and Sheriffs-Substitute shall be repealed, and all payments to Sheriffs and Sheriffs-Substitute in respect of the discharge of their official duties, other than the salaries provided to them out of public moneys, and the expenses mentioned in the last-recited section, shall cease and determine: Provided always, that it shall be lawful to the Commissioners of Her Majesty's Treasury to grant out of moneys to be provided by Parliament, such compensation as they shall think fit to any Sheriff or Sheriff-Substitute in respect of the operation of this section, regard being had to the terms of the commission under which such Sheriff or Sheriff-Substitute holds office, and to the conditions, if any, which may have been attached to any salary, or increase of salary, granted to such Sheriff or Sheriff-Substitute.\*

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\* Any one desirous of knowing what came of the authority given by this section to grant compensation may consult the Return to the House of Commons of 14th August, 1879 (No. 395). The sum which I was awarded was so small that I at first declined it; and afterwards—on being informed that the reason of the smallness was that a condition concerning the fees had by inadvertence been omitted in fixing my salary—withdrew my claim.

**ACT OF SEDERUNT to regulate the Form of Warrants for Execution on Extracts of Decrees and Acts of the Court of Session and the Sheriff Courts.—Edinburgh, 8th January, 1881.**

WHEREAS by section 1 of the Statute 1 & 2 Vict. c. 114, it is, *inter alia*, enacted, that "Where an extract shall be issued of a decree or act pronounced or to be pronounced by the Court of Session, or by the Court of Commission for Teinds, or by the Court of Justiciary, or of a decree proceeding upon any deed, decree arbitral, bond, protest of a bill, promissory note or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the Books of Council and Session or of the Court of Justiciary, the extractor shall, in terms of the schedule (No. 1) hereunto annexed (or as near to the form thereof as circumstances will permit), insert a warrant to charge the debtor or obligant to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind, and for that purpose to open shut and lockfast places:" And by section 9 of the said Act it is, *inter alia*, enacted, that "Where an extract shall be issued of any decree or act pronounced or to be pronounced by any Sheriff, or of a decree proceeding upon any deed, decree arbitral, bond, protest of a bill, promissory note or banker's note, or upon any other obligation or document on which execution may competently proceed, recorded in the Sheriff-Court books, the extractor shall, in terms of the schedule (No. 6) hereunto annexed (or as near thereto as circumstances will permit), insert therein a warrant to charge the debtor or obligant, to pay the debt or perform the obligation within the days of charge, under the pain of poinding and imprisonment, and to arrest and poind according to the present practice, and, if need be, for the purpose of poinding, to open shut and lockfast places."

"And whereas by section 1 of the Act 40 & 41 Vict. c. 40, it is enacted, that "In all extracts of writs, deeds, or other documents which contain a clause of registration for preservation and execution, and which are registered in the Register of Deeds and Probative Writs and Protests in the Books of Council and Session in Scotland, the keeper or assistant keeper of the said Register shall insert a warrant for execution in the form, or as nearly as may be in the form, of the schedule to this Act annexed. The warrants for execution inserted in the extracts of all protests of bills, promissory notes or banker's notes, or certificates of judgment registered for execution under the 'Judgments Extension Act, 1868,' shall be as nearly as may be in the form of the said schedule to this Act annexed;" And by section 2 of the said Act, it is enacted, that "In all extracts of writs, deeds, or other documents which contain a clause of registration for preservation and execution, and which are registered in the Sheriff-Court books of any county in Scotland, and in all extracts of protests of bills, promissory notes or banker's notes registered in the Sheriff-Court books, the Sheriff-Clerk shall insert a warrant of execution in the form, or as nearly as may be in the form, of the schedule to this Act annexed."

And whereas by section 4 of the Act 43 & 44 Vict. c. 34, it is enacted, that "No person shall, after the commencement of this Act (being the first day of January, one thousand eight hundred and eighty-one), be apprehended or imprisoned on account of any civil debt," except taxes, fines, or penalties due to Her Majesty, and rates and assessments lawfully imposed or to be imposed, and sums decreed for aliment; and it is further, by the

PART I.] INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882. 691

said section, provided that the said Act shall not "affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being in *meditatione fugæ* or under any decree or obligation *ad factum præstandum*."

And whereas it is necessary, in consequence of the provisions of the last recited Act, to alter to the effect hereinafter provided the form of warrants prescribed by the statute first above recited, to be inserted in extracts of decrees and acts of the Court of Session and Sheriff Courts :

Therefore the Lords of Council and Session do hereby enact and declare as follows :—

1. In extracts of decrees and acts of the Court of Session and of the Sheriff-Courts, prepared and issued under authority of the first recited statute,

the warrant appointed to be inserted by the said Act shall no longer contain the words "under the pain of poinding and imprisonment," but in place thereof shall contain the words "under the pain of poinding."

2. But this provision shall not apply to extract decrees for payment of taxes, fines, or penalties payable to Her Majesty, or of rates and assessments lawfully imposed, or to be imposed, or to extract decrees for payment of aliment, or to extract decrees *ad factum præstandum*, in all which cases the forms of warrants shall remain as at present.

And the Lords appoint this Act to be inserted in the books of sederunt, and to be printed and published in common form.

JOHN INGLIS, I.P.D.

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45 & 46 *Vict.* c. 31.—An ACT to render Judgments obtained in certain Inferior Courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom.—24th July, 1882.

WHEREAS it is expedient to extend the principle of the Judgments Extension Act, 1868, to the judgments of certain inferior Courts of Great Britain and Ireland :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*].—This Act may be cited for all purposes as the Inferior Courts Judgments Extension Act, 1882.

2. [*Interpretation of terms.*].—In this Act the following words and expressions shall have the interpretations and meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction ; (that is to say)—

The expression "judgment" shall include decret, civil bill decret, dismiss, or order :

The expression "inferior Courts" shall include County Courts, Civil Bill Courts, and all Courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts of Justice ; and in Ireland, Courts of Petty Sessions and the Court of Bankruptcy ;

and in Scotland shall include the Sheriff Courts and the Courts held under the Small Debts and Debts Recovery Acts :

The expression "registrar of an inferior Court" shall include the Sheriff-Clerk of a Sheriff's Court in Scotland, and any officer fulfilling the duties of a registrar in an inferior Court in England ; and in Ireland shall include the Clerk of the Peace or other officer whose duty it is to enter the judgment, decree, or order of the Court :

"Prescribed" means prescribed by rules made under the provisions of this Act:

The expression "person" shall include any party or parties to a cause in any inferior Court in England, Scotland, or Ireland :

The expression "plaintiff" shall include pursuer, complainer, or any person at whose instance any action or proceeding in an inferior Court is instituted ; and the expression "defendant" shall include defender, respondent, or other person against whom any such action or proceeding is directed :

The expression "action" shall mean the action or other proceeding in which any judgment was pronounced ; and the expression "summons" shall mean the summons or other initial writ in such action.

3. [*Registrar of inferior Court to grant certificate of judgment.*].—Where judgment shall hereafter be obtained or entered up in any of the inferior Courts of England, Scotland, or Ireland respectively for any debt, damages, or costs, the registrar of such inferior Court or other proper officer shall, after the time for appealing against such judgment shall have elapsed, and in the event of such judgment not being reversed upon appeal or of execution thereunder not being stayed, upon the application of the party who has recovered such judgment, and upon proof that the same has not been satisfied, and payment of the prescribed fee, grant a certificate in the form in the schedule to this Act annexed.

4. [*Registration of certificate shall have the effect of a judgment of the Court in which it is registered.*].—On the production to the registrar or other proper officer of a County Court, or, in the city of London, of the City of London Court in England, where a judgment has been obtained in Scotland or Ireland, or to the registrar or other proper officer of a Sheriff's Court in Scotland where a judgment has been obtained in England or Ireland, or to the registrar or other proper officer of a Civil Bill Court in Ireland where a judgment has been obtained in England or Scotland, of a certificate under this Act purporting to be signed by the registrar or other proper officer of the inferior Court where such judgment was obtained, such certificate shall, on payment of the prescribed fee, be registered in the prescribed form by such registrar or other proper officer to whom the same shall be produced for that purpose ; and all reasonable costs and charges attendant upon the obtaining and registering such certificate shall be added to and recovered in like manner as if the same were part of the original judgment. No certificate of any such judgment shall be registered as aforesaid in any inferior Court in the United Kingdom more than twelve months after the date of such judgment.

5. [*Execution of judgments.*].—Where a certificate of a judgment of any of the inferior Courts aforesaid has been registered under this Act, process of execution may issue thereon out of the Court in which the same shall have been so registered against any goods or chattels of the person against whom such judgment shall have been obtained, which are within the jurisdiction of such last-mentioned Court, in the same or the like manner as if the judgment to be executed had been obtained in the Court in which such certificate shall be so registered as aforesaid.

6. [*Jurisdiction over registered judgments limited to execution.*].—The Courts of Great Britain and Ireland to which this Act applies shall, in so far as relates to execution under this Act, have and exercise the same control and jurisdiction over and with respect to the execution of any judgment, a certificate of which shall be registered under this Act, as they now have and exercise over and with respect to the execution of any judgment in their own Courts.

7. [*Cancellation of registry.*].—On proof of the setting aside, or satisfaction, of any judgment of which a certificate shall have been registered under this Act, the Court in which such certificate is so registered may order the registration thereof to be cancelled.

8. [*Costs not to be allowed in actions on judgments unless by order of Court.*].—In any action brought in any of the inferior Courts aforesaid for the purpose of enforcing any judgment which might be registered under this Act in the country in which such action is brought, the party bringing such action shall not recover or be entitled to any costs or expenses, unless the Court in which such action shall be brought shall otherwise order.

9. [*Existing limits of local jurisdiction shall not be exceeded.*].—Nothing contained in this Act shall authorise the registration in an inferior Court of the certificate of any judgment for a greater amount than might have been recovered if the action or proceeding had been originally commenced in such inferior Court.

Provided that where a judgment obtained in an inferior Court in Scotland cannot be registered in an inferior Court in England or Ireland, by reason of its being for a greater amount than might have been recovered if the action or proceeding had been originally commenced in such inferior Court, it shall be competent to register a certificate of such judgment in the register directed to be kept in the Court of Common Pleas at Westminster and Dublin respectively, to be called "The Register of Scotch Judgments," by section three of the Judgments Extension Act, 1868, in the same manner, to the same effect, and subject to the same provisions, as if the said certificate had been a certificate of an extracted decret of the Court of Session, registered in the said register under the said Act.

10. [*Act not to apply in certain cases.*].—This Act shall not apply to any judgment pronounced by any inferior Court in England against any person domiciled in Scotland or Ireland at the time of the commencement of any action, unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to

have been fulfilled, within the district of such inferior Court, and the summons was served upon the defendant personally within the said district; nor to any judgment pronounced by any inferior Court in Scotland against any person domiciled in England or Ireland at the time of the commencement of any action, unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior Court, and the summons was served upon the defendant personally within the said district; nor to any judgment pronounced by any inferior Court in Ireland against any person domiciled in England or Scotland at the time of the commencement of any action, unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior Court, and the summons was served upon the defendant personally within the said district.

Provided that it shall be competent to any person against whom any judgment to which this Act does not apply, as aforesaid, is sought to be enforced by registration in the register of an inferior Court in England or Ireland, to apply for and obtain from one of the superior Courts of England or Ireland a prohibition or injunction against the enforcement of such judgment, and of any execution thereupon; and that it shall be competent to any person against whom any judgment to which this Act does not apply, as aforesaid, is sought to be enforced by registration in the register of an inferior Court in Scotland, to apply for and obtain from the Bill Chamber or Court of Session in Scotland suspension or suspension and interdict of or against the enforcement of such judgment and any diligence thereon, and in any such proceeding as aforesaid the unsuccessful party may be found liable in costs.

11. [*Rules.*—Rules for the purposes of this Act may be made and altered from time to time by the like persons and in the like manner in which rules and regulations may be respectively made under and for the purposes of the County Courts Acts in England, of the Sheriffs Courts Acts in Scotland, and of the Civil Bill Courts Acts in Ireland; provided that the said rules and regulations shall not extend the jurisdiction of any inferior Court.

## SCHEDULE.

### CERTIFICATE ISSUED IN TERMS OF THE INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.

I , certify that [*here state name, business or occupation, and address of person obtaining judgment, and whether plaintiff or defendant*]  
on the                      day of                      18                      , obtained judgment against  
[*here state name, business or occupation, and address of person against whom judgment was obtained, and whether plaintiff or defendant*] in the  
Court of                      for payment of the sum of                      on account

of [here state shortly the nature of the claim with the amount of costs (if any) for which judgment was obtained].

[To be signed by the Registrar or other proper Officer of the inferior Court from which the certificate issues, and to be sealed with the seal of the Court.]

NOTE OF PRESENTATION TO BE APPENDED TO ABOVE FORM.

The above certificate is presented by me for registration in the Court of \_\_\_\_\_, in accordance with the provisions of the Inferior Courts Judgments Extension Act, 1882.

[Signature and address of Solicitor, Law-Agent, or Creditor presenting for Registration.]

ACT OF SEDERUNT in pursuance of the Inferior Courts Judgments Extension Act, 1882.—Edinburgh, 7th March, 1883.

THE Lords of Council and Session, in pursuance of the power vested in them by the Act of Parliament passed in the 45th and 46th years of Her present Majesty's reign, chapter 31, entitled, "An Act to render Judgments obtained in certain Inferior Courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom," do hereby ENACT and DECLARE as follows :—

1. That in each county in Scotland, and at each place in such county at which the ordinary Courts of the Sheriff-Substitutes are held, there shall be kept by the Sheriff-Clerk, a book, to be called "The Register of English and Irish Judgments," in which shall be registered *in extenso* all certificates issued in terms of the said Act, from any of the inferior Courts of England and Ireland, with the note of presentation appended to such certificate required by said Act.

2. That after registration as aforesaid, the Sheriff-Clerk shall append to such certificate and note of presentation, an attestation, signed by himself, of the registration of the same, in the terms set forth in the annexed Schedule (A), which registered certificate, with the

attestation thereon by the Sheriff-Clerk, shall be a sufficient warrant to officers of Court to charge the debtor in the judgment debt to make payment of the whole sums recoverable under such judgment, with the costs of obtaining and registering such certificate, within fifteen days after the date of such charge, and to use any further diligence that may be competent.

3. That for granting any certificate issued in terms of said Act, and for registering any such certificate, with note of presentation as aforesaid, and attesting that such registration has been made, the Sheriff-Clerk shall be entitled to charge the fees set forth in the Schedule (B), hereto annexed; and for preparing and presenting any note of presentation required by said Act, and

obtaining the registration of any certificate, and the attestation of such registration, law-agents shall be entitled to charge the fees also set forth in said Schedule (B).

4. The words "Sheriff-Clerk" shall

include Sheriff-Clerk depute.

And the Lords appoint this Act to be inserted in the books of sederunt, and to be published in the usual manner.

JOHN INGLIS, *I.P.D.*

## SCHEDULES.

### SCHEDULE (A).

(Place and date.)

I hereby declare that the foregoing certificate and note of presentation have been duly registered by me in the "Register of English and Irish Judgments," kept at this place, in terms of the Act 45 & 46 Vict. c. 31, and relative Act of Sederunt, dated the 7th of March, 1883.

A B, *Sheriff-Clerk (or Sheriff-Clerk Depute) of*

### SCHEDULE (B).

#### I. *Sheriff-Clerk's Fees.*

I. For granting the certificate contained in the schedule appended to said Act of Parliament—

|  |    |   |   |
|--|----|---|---|
| In cases where the debt or sum decerned for does not exceed £12, . . . . .                   | £0 | 1 | 6 |
| In cases where the debt or sum decerned for exceeds £12, and does not exceed £50, . . . . .  | 0  | 2 | 6 |
| In cases where the debt or sum decerned for exceeds £50, and does not exceed £200, . . . . . | 0  | 3 | 6 |
| In all other cases, . . . . .  | 0  | 5 | 0 |

II. For registering any certificate issued in terms of the said Act, with note of presentation thereto appended, and attesting such registration—

|  |   |   |   |
|--|---|---|---|
| In cases where the debt or sum decerned for does not exceed £12, . . . . .                   | 0 | 1 | 6 |
| In cases where the debt or sum decerned for exceeds £12, and does not exceed £50, . . . . .  | 0 | 2 | 6 |
| In cases where the debt or sum decerned for exceeds £50, and does not exceed £200, . . . . . | 0 | 3 | 6 |
| In all other cases, . . . . .  | 0 | 5 | 0 |



**PART I.] ORDER XLI. OF ENGLISH COUNTY COURT RULES, 1883. 697**

**II. *Law-Agent's Fees.***

I. For preparing and presenting any note of presentation as required by said Act, and obtaining registration of certificate issued in terms of said Act, with such note of presentation, together with attestation of such registration—

|  |        |
|--|--------|
| In cases where the debt or sum decerned for does not exceed £12, . . . . .                   | £0 1 6 |
| In cases where the debt or sum decerned for exceeds £12, and does not exceed £50, . . . . .  | 0 2 6  |
| In cases where the debt or sum decerned for exceeds £50, and does not exceed £200, . . . . . | 0 3 6  |
| In all other cases, . . . . .  | 0 5 0  |

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**ORDER XLI. OF ENGLISH COUNTY COURT  
RULES OF 1883.**

26. [*Proof that judgment is not satisfied.*].—Where under section 3 of the Inferior Courts Judgments Extension Act, 1882, application is made for the grant of a certificate of a judgment, a fee of two shillings and sixpence shall be paid, and proof that the judgment has not been satisfied and of the amount remaining unsatisfied shall be given to the satisfaction of the registrar by affidavit, if required.

27. [*When certificate shall not be granted.*].—If the judgment is for payment within a period therein mentioned or by instalments, and such period shall not have expired or default shall not have been made in payment of some instalment, the certificate shall not be granted.

28. [*Names, &c., to be set forth in certificate.*].—The names, businesses or occupations, and addresses of the parties to be set forth in the certificate shall be those set forth in the books of the Court.

29. [*Additions to certificate.*].—The registrar shall endorse on the certificate the number of the plaint and the amount remaining due on the judgment, according to the books of the Court, and, after his signature, shall add to the certificate the date on which it is granted.

30. [*Record and effect of granting certificate.*].—Where a certificate of a judgment is granted by a registrar of a County Court he shall make on the minute of the judgment a memorandum of having granted such certificate, and thenceforth no further proceeding shall be taken or had upon such judgment in such Court, until the Court, or registrar, upon being satisfied that the execution issued in the Court in which the certificate was registered was unproductive, shall order that the judgment may be acted on as if such certificate had not been granted.

31. [*Costs of obtaining certificate.*].—There shall be allowed to a solicitor for the costs of obtaining the certificate five shillings, and where an affidavit is required, seven shillings.

32. [*Endorsement of costs allowed to be made on certificate.*].—The costs, if any, allowed, with the addition of the fee of two shillings and sixpence to be paid for the granting of the certificate, shall be endorsed on the certificate by the officer granting the same; which endorsement shall be an authority for the Court in which the certificate is registered to add the said costs and fee to the amount to be recovered by execution against the goods and chattels of the person against whom the judgment shall have been obtained.

33. [*On presenting certificate for registration a copy to be filed.*].—The person presenting a certificate for registration shall add to his note of presentation, to be appended to the certificate, a description of the place within the jurisdiction of the Court in which the goods and chattels of the person against whom the judgment has been obtained are, and shall also present a copy thereof, with the endorsement thereon, written on foolscap paper. Payment of a fee of two shillings and sixpence shall be made at time of presentation.

34. [*Registration of certificate.*].—On the presentation of a certificate for registration, with a copy as aforesaid, the registrar shall, if the place within which the goods and chattels of the person against whom the judgment has been obtained are stated to be, is within the jurisdiction of the Court of which he is the registrar, seal the certificate and register the same by pasting it into the then current minute-book of the Court, on the last page or so of such book, and shall seal and date the copy of the certificate, and return it to the person presenting the certificate.

35. [*Cost of registering.*].—There shall be allowed to a solicitor for the cost of registering a certificate the sum of five shillings, which, with the fee for registry and the cost, if any, allowed for granting the certificate as shown by the endorsement thereon, shall be added to the amount to be recovered. The warrant of execution shall be according to the form in the schedule hereunto.

36. [*No money to be paid out except on production of sealed copy.*].—No money shall be paid out of Court unless on production of the sealed copy of the certificate: Provided that in the event of such copy being lost or destroyed another copy may be sealed and given to the proper person upon proof by affidavit or otherwise to the satisfaction of the registrar that the person applying is the proper person and that he is entitled to the moneys recovered on the judgment, and upon payment of the fee of one shilling.

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## SCHEDULE.

### 314. Certificate to be given by a County Court.

#### INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.

I, \_\_\_\_\_, certify that [*here state name, business or occupation, and address of person obtaining judgment, and whether plaintiff or defendant*] on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, obtained judgment against [*here state name, business or occupation, and address of person against whom judgment was obtained, and whether plaintiff or defendant*] in the County Court of \_\_\_\_\_ holden at \_\_\_\_\_ for payment of the sum of \_\_\_\_\_ on account of [*here state shortly the nature of the claim with the amount of costs (if any) for which judgment was obtained.*]

*Registrar.*

*Date.*

#### *Endorsement to be made on Certificate granted by a County Court.*

No. of Plaint.

|   |  |  |  |
|---|--|--|--|
| Amount for which judgment was obtained, . . . . .   |  |  |  |
| Paid into Court, . . . . .  |  |  |  |
| Remaining due on judgment, . . . . .  |  |  |  |
| Fee and costs for obtaining certificate of the judgment (45 & 46 Vict. cap. 31, sect. 4), . . . . |  |  |  |
| Total, . . . . .  |  |  |  |

#### *Note of Presentation to be appended to a Certificate sought to be registered in a County Court.*

The above certificate is presented by me for registration in the County Court of \_\_\_\_\_ holden at \_\_\_\_\_, in accordance with the provisions of the Inferior Courts Judgments Extension Act, 1882.

*Here insert place, &c., in which the goods are.*

*Solicitor or Creditor.*

*Address.*

*Date.*

### 315. Warrant of Execution.

#### INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.

In the \_\_\_\_\_ County Court of \_\_\_\_\_, holden at \_\_\_\_\_, between \_\_\_\_\_, plaintiff [*address and description, as given in certificate*], and \_\_\_\_\_, defendant [*address and description, as given in certificate*].

Whereas on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, [or the plaintiff defendant] obtained a judgment in \_\_\_\_\_ against the defendant

[or plaintiff], in [here set forth the Court mentioned in the certificate], for payment of the sum of £                      for debt and costs [or damages and costs, or for costs; add where the certificate shows that judgment was to be paid by instalments], and it was thereupon ordered by the said Court that the defendant [or plaintiff] should pay the same by instalments of                      for every                      days.

And whereas the said judgment has been duly registered in this Court, pursuant to the Inferior Courts Judgments Extension Act, 1882: These are therefore to require and order you forthwith to make and levy, by distress and sale of the goods and chattels of the defendant [or plaintiff], wheresoever they may be found within the district of this Court (except the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff [or defendant] under the said judgment, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant [or plaintiff] which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this Court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the Court, this                      day of  
18                      ,                      By the Court,

, Registrar of the Court.

To the High Bailiff of the said Court and others, the Bailiffs thereof.

|  | £ | s. | d. |
|--|---|----|----|
| Amount for which judgment was obtained, . . . . .  |   |    |    |
| Paid as stated in certificate, . . . . .   |   |    |    |
| Costs for obtaining and registering certificate of<br>the judgment (45 & 46 Vict. c. 31, § 4), . . . . . |   |    |    |
| Remaining due, . . . . .   |   |    |    |
| Poundage for issuing this warrant, . . . . .   |   |    |    |
| Total amount to be levied, £   |   |    |    |

NOTICE.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the debtor.

19 & 20 Vlet.  
c. 108, § 46.

19 & 20 Vict. Application was made to the registrar for this warrant at  
c. 108, § 46. minutes past the hour of  
in the noon of the day of , 18 .

[Here state for the information of the High Bailiff the place, &c., where the goods are stated to be.]

**IRISH COUNTY COURT RULES, under the Inferior Courts  
Judgments Extention Act 1882, made 7th June, 1883.**

These rules (which may be had, price 3d., from Messrs. Alex. Thom & Co., Abbey Street, Dublin) are exactly the same as the English County Court Rules, printed above, with the exception that "decree or dismiss" is used in place of the word "judgment," and that "Clerk of the Peace" is used in place of "Registrar of a County Court."

**45 & 46 Vict. c. 77.—An ACT to amend the Law of Citation in Scotland.—18th August, 1882.**

WHEREAS by the Citation Amendment (Scotland) Act, the process of citation in Scotland was amended in certain particulars, and it is desirable that it should be further amended :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :—

1. [*Short title.*—This Act may be cited as the Citation Amendment (Scotland) Act, 1882.
2. [*Commencement of Act.*—This Act shall commence on the first day of January one thousand eight hundred and eighty-three.
3. [*Citation may be by registered letter.*—From and after the commencement of this Act—

In any civil action or proceeding in any Court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in Scotland by an officer of the Court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice might lawfully execute the same, or by an enrolled law-agent, by sending to the known residence or place of business of the person upon

whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation, or to the office of the keeper of edictal citations where the summons, warrant, or judicial intimation is required to be sent to that office, a registered letter by post containing the copy of the summons or petition or other document required by law in the particular case to be served, with the proper citation or notice subjoined thereto, or containing such other citation or notice as may be required in the circumstances, and such posting shall constitute a legal and valid citation, unless the person cited shall prove that such letter was not left or tendered at his known residence or place of business, or at his last known address if it continues to be his legal domicile or proper place of citation.

4. [*Execution.*].—The following provisions shall apply to service by registered letter:—

- (1.) The citation or notice subjoined to the copy or other citation or notice required in the circumstances shall specify the date of posting, and in cases where the party is not cited to a fixed diet, but to appear or lodge answers or other pleadings within a certain period, shall also state that the induciæ or period for appearance or lodging answers or other pleadings is reckoned from that date:
- (2.) The induciæ or period of notice shall be reckoned from twenty-four hours after the time of posting:
- (3.) The execution to be returned by the officer or law-agent shall be accompanied by the post-office receipt for the registered letter. The execution returned by a law-agent shall for all purposes be equivalent to an execution by an officer of Court. The execution may be in the form contained in the First Schedule hereto:
- (4.) [*Notice on back of letter.*].—On the back of such registered letter besides the address there shall be written or printed the following notice or a notice to the like effect:

This letter contains a citation to or intimation from [*specify the Court*]. If delivery of the letter cannot be made, it is to be returned immediately to [*give the official name and office or place of business of the Clerk of Court*]:

- (5.) [*Letter not delivered to be returned to Clerk of Court.*].—If delivery of the letter be not made because the address cannot be found, or because the house or place of business at the address is shut up, or because the letter-carrier is informed at the address that the person to whom the letter is addressed is not known there, or because the letter was refused, or because the address is not within a postal delivery district and the letter is not called for within twenty-four hours after its receipt at the post-office of the place to which it is addressed, or for any other reason, the letter shall be immediately returned through the post-office to the Clerk of Court, with the reason for the failure to deliver

marked thereon, and the clerk shall make intimation to the party at whose instance the summons, warrant, or intimation was issued or obtained, and shall, where the order for service was made by a judge or magistrate, present the letter to a judge or magistrate of the Court from which the summons, warrant, or intimation was issued, and he may, if he shall think fit, order service of new, either according to the present law and practice or in the manner hereinbefore provided, and if need be substitute a new diet of appearance. Where the judge or magistrate is satisfied that the letter has been tendered at the proper address of the party or witness and refused, he may in the case of a witness, without waiting for the diet of appearance, issue second diligence to secure his attendance, and in the case of a party hold the tender equal to a good citation.

5. [*Fees.*—The fees for service under this Act shall be those contained in the Second Schedule hereto, and no other or higher fees shall be allowed on taxation.

6. [*Mode of service optional.*—It shall be lawful to execute summonses and warrants of citation, warrants of service, judicial intimations, either according to the existing law and practice or in the manner provided by this Act :

Provided that no higher fees shall be allowed on taxation than those contained in the schedule hereto, unless the judge or magistrate deciding the case shall be of opinion that it was not expedient in the interests of justice that such service should be made in the manner hereinbefore provided.

7. [*Definition.*—The word "person" shall include corporation, company, firm, or other body requiring to be cited or to receive intimation.

## SCHEDULES.

### FIRST SCHEDULE.

This summons, or warrant of citation, or note of suspension, or petition, or other writ or citation executed [or intimated] by me [*insert name*] messenger-at-arms [or other officer or law-agent] against [or to] [*insert name or names*] defender [or defenders, or respondent or respondents, or witness or witnesses, or haver or havens, or otherwise as the case may be], by posting on            last, between the hours of            and            , at the post-office of            , a copy of the same to him [or them], with citation [or notice] subjoined, [or citation or notice where no copy is sent], in a registered letter [or registered letters], addressed as follows, viz :—

*Signature of Officer or Agent.*

## SECOND SCHEDULE.

*Fees for Service or Citation by registered letter and for returning execution.*

## A. COURT OF SESSION.

|   |    |    |
|---|----|----|
| 1. Parties—   | s. | d. |
| If one party, . . . . .                                       | 3  | 6  |
| If more than one, for each party after the first, . . . . .   | 2  | 6  |
| 2. Witnesses—   |    |    |
| For citing each witness, . . . . .                            | 1  | 6  |
| 3. Post-office charge for registration and postage of letter. |    |    |

## B. INFERIOR COURTS.

|   |   |   |
|---|---|---|
| 1. Parties—   |   |   |
| For citing to Small Debt Courts, claim not exceeding £5, . . . . .                | 1 | 0 |
| Claim above £5 and not exceeding £12, . . . . .                                   | 1 | 6 |
| For citing to Debts Recovery Court, . . . . .                                     | 2 | 0 |
| For citing to Ordinary Court, or any other citation not above included, . . . . . | 2 | 6 |

Where there are more parties than one cited in the same cause, and only one execution is necessary, the above-mentioned fees respectively shall be allowed for the first party only, and two-thirds thereof for every other.

|   |    |    |
|---|----|----|
| 2. Witnesses—   | s. | d. |
| (1.) Small Debt and Debts Recovery Courts—                            |    |    |
| For citing one witness, . . . . .                                     | 1  | 0  |
| For citing every witness after the first for the same diet, . . . . . | 0  | 8  |
| (2.) Ordinary Court—  |    |    |
| For citing one witness, . . . . .                                     | 1  | 6  |
| For citing every witness after the first for the same diet, . . . . . | 1  | 0  |
| 3. Post-office charge for registration and postage of letter.         |    |    |



## PART II.

## ORDINARY COURTS—SPECIAL ACTS.

## CHAPTER I.—ALIMENT AND LAW-BURROWS.

45 & 46 Vict. c. 42.—An ACT to amend the law relating to Civil Imprisonment in Scotland.—18th August, 1882.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*—This Act may be cited for all purposes as the Civil Imprisonment (Scotland) Act, 1882.

2. [*Commencement of Act.*—This Act shall come into operation on the first day of October one thousand eight hundred and eighty-two, which date is hereinafter referred to as the commencement of this Act.

3. [*Imprisonment for alimentary debts.*—From and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment.

4. [*Power to imprison for wilful failure to obey decree for alimentary debt.*—Subject to the provisions hereinafter contained, any Sheriff or Sheriff-Substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court; provided—

(1.) That the warrant to commit to prison may be applied for by the creditor in the sum or sums decerned for without any concurrence :

(2.) That the application shall be disposed of summarily, and without any written pleadings.

3. That the failure to pay shall be presumed to have been with such due warning a warrant or the order, but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-Substitute that the debtor has not, since the commencement of the action in which the failure was proved, done or done or been able to do the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable :
4. That a warrant of imprisonment may be granted if new subject to the same provisions and conditions as instalments of not less than six months, against the same person in respect of failure to pay the same sum or sums of instalment and expenses of process, if it is as far as still remaining due, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable, or if any sums afterwards becoming due under the decree, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable :
5. That the imprisonment shall not to any extent operate as a satisfaction or extinction of the debt, or interfere with the creditor's other rights and remedies for its recovery :
6. That the creditor upon whose application the warrant of imprisonment is granted, shall not be liable to aliment or to contribute to the expenses of the debtor while incarcerated under such warrant ; but that the incarcerated debtor shall be subject to the enactments and rules as to maintenance, work, discipline and otherwise, applicable to the class of prisoners committed for obedience of Court :
7. [Imprisonment for rates and assessments].—No person shall, on account of failure to pay rates and assessments, be imprisoned for a longer period than six weeks in all at the instance of the rating authority or authorities of any one parish, combination, district, county, or borough, in respect of his failure to pay the rates and assessments due for any one year, without prejudice to any other civil rights and remedies competent to the rating authority.
8. [Imprisonment in law-burrows, &c.].—In order to amend the law in regard to imprisonment in the process of law-burrows, the following provisions shall have effect ; (that is to say) :—
  - (1.) It shall not be competent to issue letters of law-burrows under the signet in the Court of Session or Court of Justiciary :
  - (2.) Upon an application for law-burrows being presented, the Sheriff or Sheriff-Substitute or Justice of the Peace shall immediately, and without taking the oath of the applicant, order the petition to be served upon the person complained against, and shall at the same time grant warrant to both parties to cite witnesses :
  - (3.) At the diet of proof appointed, or at any adjourned diet, the application shall be disposed of summarily under the provisions of the

Summary Jurisdiction Acts, and without any written pleadings or record of the evidence being kept, and expenses may be awarded against either party if and as it shall seem just :

- (4.) In every application for law-burrows the parties shall be competent witnesses, and the Sheriff, or Sheriff-Substitute, or Justice of the Peace, may grant the prayer of the petition upon the sworn testimony of one credible witness, although such witness may be a party :
- (5.) In the event of the Sheriff, or Sheriff-Substitute, or Justice of the Peace, ordering caution to be found, the amount of caution shall be in his discretion :
- (6.) The Sheriff, or Sheriff-Substitute, or Justice of the Peace, may, in the event of his ordering caution to be found, further order that the party complained against shall, failing his finding caution, be imprisoned for a period not exceeding six months, if the order be made by a Sheriff or Sheriff-Substitute, and not exceeding fourteen days, if the order be made by a Justice of the Peace :
- (7.) It shall be in the power of the Sheriff, or Sheriff-Substitute, or Justice of the Peace to order the party complained against to grant his own bond without caution for duly implementing the terms of the order, and failing such bond being granted within the time limited by the order, such order may further direct that the party failing shall be imprisoned for such periods as aforesaid :
- (8.) The applicant shall not be bound to aliment or contribute to the aliment of the person complained against when incarcerated ; but the person so incarcerated shall be subject to the enactments and rules as to maintenance, work, discipline, and otherwise, applicable to the class of prisoners committed for contempt of Court :

Provided always, that except in so far as expressly altered by this section, nothing in this Act shall affect the existing law and practice in regard to the process of law-burrows.

7. [*Discharge of persons in custody at the commencement of this Act.*].—Where any person is at the commencement of this Act in custody under a warrant of imprisonment or other process in any case in which he would not be liable to be apprehended or imprisoned or detained in custody after the commencement of this Act, such person shall, within twelve hours after the commencement of this Act, be discharged from such custody ; but his apprehension, imprisonment, or discharge shall not affect the other rights or remedies of any creditor or other person in respect of any debt, claim, or demand against him.

8. [*Amendment of law as to aliment of civil prisoners.*].—With respect to the alimentering of civil prisoners entitled to aliment, the following provision shall have effect ; (that is to say)—

The gaoler or other person in whose hands the sum of ten shillings shall have been deposited, in terms of the act sixth George the Fourth, chapter sixty-two, as a means of and security for the aliment of any civil prisoner, shall, as from the date of his imprisonment, pay out of the same the aliment of the said prisoner at the rate of not exceeding one shilling per diem : Provided that, if such prisoner shall not apply for or shall not be found entitled to aliment, any sum expended under this sub-section shall be a debt due by him to the incarcerating creditor.

9. [*Construction of Act, 43 & 44 Vict. c. 34; 44 & 45 Vict. c. 22.*—This Act shall be read and construed together with the Debtors (Scotland) Act, 1880, and the Bankruptcy and Cessio (Scotland) Act, 1881.

## CHAPTER II.—CONJUGAL RIGHTS ACTS.

24 & 25 Vict. c. 86.—An ACT to amend the Law regarding  
Conjugal Rights in Scotland.—6th August, 1861.

WHEREAS it is expedient to amend the law of *Scotland* relating to Husband and Wife : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :—

1. [*A wife deserted by her husband may apply for an order to protect property which she has or may acquire by her own industry, or which she may succeed to.*—A wife deserted by her husband may, at any time after such desertion, apply by petition to any Lord Ordinary of the Court of Session, or in the time of vacation to the Lord Ordinary on the Bills for an order to protect property which she has acquired or may acquire by her own industry after such desertion, and property which she has succeeded to or may succeed to, or acquire right to after such desertion, against her husband or his creditors, or any person claiming in or through his right ; and the Lord Ordinary shall appoint such petition to be intimated in the minute-book of the Court of Session, and to be served upon the husband ; and the husband, or any creditor of the husband, or any other person claiming in or through his right, shall be entitled to lodge answers to the said petition, and if the husband be furth of *Scotland* the petition shall be executed edictally against him on an induciæ of twenty-one days ; and upon considering such petition the Lord Ordinary shall require evidence of such desertion, and on being satisfied thereof pronounce an interlocutor giving to the wife protection of her property as aforesaid against the husband and all creditors or persons claiming under or through him ; and

if answers be lodged to the said petition, the Lord Ordinary may, on considering the same, and, if he consider it necessary, after hearing parties, allow a proof to them of their respective averments, which proof he shall take himself, and either write the evidence with his own hand, in which case it shall be read over to the witness by the judge, and signed by the witness, if he can write, or the Lord Ordinary shall record the evidence by dictating it to a clerk, in which case it shall, when taken down, be read over and signed as above; or the Lord Ordinary shall cause the evidence to be taken down and recorded by a writer skilled in shorthand writing in manner after-mentioned, and it shall be competent to the Lord Ordinary, on special cause shown, instead of taking such proof to grant a commission to take said proof elsewhere than in *Edinburgh*, in which case he may pronounce an interlocutor setting forth such special cause, and granting commission to take such proof, and if satisfied after proof of the fact of such desertion, and that the same was without reasonable cause, he shall pronounce an interlocutor giving to the wife protection as aforesaid, and he shall appoint intimation of the said interlocutor having been pronounced to be made in one or more newspapers published within the county within which the wife is resident, or in such other newspapers as the Lord Ordinary may appoint.

2. [*Husband or creditor may apply by petition for recall of order.*—It shall be lawful for the husband, or any creditor or other person claiming in or through his right, if such creditor, husband, or other person have not lodged answers as aforesaid, to apply by petition to the Lord Ordinary by whom such order was made for the recall thereof; and the Lord Ordinary shall appoint such petition to be answered by the wife, and thereafter dispose of the application as he shall think just; but such recall shall not affect any right or interest onerously and *bona fide* acquired by any third party from the wife before said recall; and the Lord Ordinary shall direct that publication of his interlocutor be made in manner hereinbefore provided.

3. [*Interlocutors may be reviewed. How long order of protection to continue operative. No action of adherence competent while order subsists.*—All interlocutors of the said Lord Ordinary may be brought under review of either division of the Court of Session, by lodging and boxing within twenty-one days after the pronouncing of such interlocutors, if in session; and if the said twenty-one days shall expire during vacation, by lodging in the Bill Chamber a reclaiming note and boxing the same at the first box-day after the expiry of the said twenty-one days: Provided always, that, notwithstanding such reclaiming note, the interlocutor of the Lord Ordinary granting protection shall take effect when intimated as aforesaid, unless the Lord Ordinary, either at the time of the pronouncing thereof or within forty-eight hours thereafter, order that his interlocutor shall not take effect till the advising of the reclaiming note, or such other period as he may think fit; and such order of protection shall, where

there has been appearance by the husband, continue operative until such time as the wife shall again cohabit with her husband, or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion, and cohabits with his wife; and the Lord Ordinary may require him to find security for such period as he may be appointed, that he shall continue to cohabit with her; and upon the Lord Ordinary being so satisfied, and security found, if required, he shall recall the order of protection; but such recall shall not affect any right or interest acquired by the wife while the said order subsisted, which right and interest shall remain vested in her, exclusive of her husband's *jus mariti* or right of administration; nor shall it affect any right or interest acquired by a third party during such period, or any third party through or from her, while the said order subsisted; and until such order be recalled it shall not be competent for the husband to institute an action of adherence against his wife; and the Lord Ordinary shall direct that publication of its recall be made in manner hereinbefore provided.

4. [*After interlocutor of protection is pronounced, property of wife to belong to her as if unmarried.*].—After an interlocutor of protection is pronounced and duly intimated, the property of the wife as aforesaid shall belong to her as if she were unmarried: Provided always, that such protection shall not extend to property acquired by the wife of which the husband or his assignee or disponee has before the date of presenting said petition obtained full and complete lawful possession, nor shall such protection affect the right of any creditor of the husband over property which he has before the date thereof duly attached by arrestment, followed by a decree of forthcoming, or which such creditor has before the said date duly poinded, and of which he has carried through and reported a sale.

5. [*Order of protection to have effect of decree of separation.*].—If any such order of protection be made and intimated, it shall have the effect of a decree of separation *a mens et thoro* in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued.

6. [*In case of separation the property of the wife to belong to her exclusively of the jus mariti and right of administration; also for purposes of contract and suing.*].—After a decree of separation *a mens et thoro* obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried, and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead; provided that if any such wife should again cohabit with her husband all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, and the *jus mariti* and right of administration of

her husband shall be excluded in reference thereto, subject, however, to any agreement in writing made between herself and her husband : and the wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married ; and her husband shall not be liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as pursuer or defender of any action, after the date of such decree of separation and during the subsistence thereof ; provided that where upon any such separation aliment has been decreed or ordered to be paid to the wife and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use.

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**37 & 38 Vict. c. 31.—An ACT to amend the Conjugal Rights (Scotland) Amendment Act, 1861.—16th July, 1874.**

WHEREAS an Act was passed in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty (24 & 25 Vict. c. 86), intituled *An Act to amend the Law regarding Conjugal Rights in Scotland* :

And whereas the expense of procedure under that Act prevents many persons from availing themselves of its benefits, and it is desirable to amend the same : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same.

1. [*Definition of "Sheriff."*—The word "Sheriff" shall include Sheriff-Substitute.

2. [*Sheriff's jurisdiction extended to applications for orders to protect property of deserted wives and for the recall of such orders.*—The Sheriffs of counties in Scotland shall have all jurisdictions, powers, and authorities necessary for hearing, trying, and determining applications by wives deserted by their husbands for orders to protect property that they have acquired or may acquire by their own industry after such desertion, and property which they have succeeded to or may succeed to or acquire right to after such desertion, against their husbands or creditors of their husbands or any persons claiming in or through the rights of their husbands, and applications by the husbands of such wives, their creditors, or others claiming in or through the rights of such husbands for the recall of such orders : Provided as follows :—

- (1.) All such applications in the Sheriff-Court shall be made by petition in common form, and, subject to any orders and regulations which the Court of Session are hereby authorised to make from

time to time as to procedure in such applications, the procedure in every such petition, including the procedure in appeals taken therein within the Sheriff Court or to the Court of Session, shall, as nearly as may be, be the same as in an ordinary action in the Sheriff Court :

- (2.) The conditions on which orders to protect property as aforesaid may be granted or recalled in the Sheriff Court shall be the same as those on which such orders may be granted or recalled in the Court of Session. The provisions of the recited Act relating to the intimation of interlocutors granting or recalling such orders in the Court of Session shall apply to the intimation of such interlocutors when pronounced in the Sheriff Court ; and the effects of the grant or recall of any such order duly intimated shall be the same when made in the Sheriff Court as when made in the Court of Session :

- (3.) An application for the recall of any such order to protect property granted in a Sheriff Court shall be competent only when made in the Sheriff Court to whose jurisdiction the deserted wife is for the time amenable, or in the Court of Session.

It shall be the duty of the clerk of the Court in which any such order was granted to transmit the process in which it was granted to any other Court on receiving written notice from a clerk thereof of the dependence therein of an application for the recall of such order :

- (4.) It shall not be necessary to print the petition, answer, or evidence in order to the disposal by the Court of Session of any appeal taken thereto from a Sheriff Court in any application by this Act made competent in the Sheriff Court :

- (5.) Any warrant of citation granted by a Sheriff in any such application may, when necessary, be executed edictally (without the concurrence or authority of the Court of Session) by delivery of a copy thereof at the office of the keeper of edictal citations according to the mode established by the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, in regard to the execution edictally of citations on warrants of the Court of Session, dated the twenty-fourth day of December, one thousand eight hundred and thirty-eight, and by sending a copy thereof by post to the last known address of the person to be cited.

The keeper of edictal citations or his clerk shall register an abstract of every such copy so delivered, in the record for edictal citations by virtue of letters of supplement to persons furth of Scotland to appear before any of the inferior Courts of Scotland ; and such abstract shall exhibit such particulars as are required to be exhibited in an abstract of any copy citation



by law appointed to be made or registered by the said keeper or his clerk.

3. [*Short title.*—This Act may be cited as the Conjugal Rights (Scotland) Amendment Act, 1874.

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#### CHAP. III.—EMPLOYERS AND WORKMEN ACT.

38 & 39 *Vict.* c. 90.—An ACT to enlarge the Powers of County Courts in respect of disputes between Employers and Workmen, and to give other Courts a limited civil jurisdiction in respect of such disputes.—13th August, 1875.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

##### *Preliminary.*

1. [*Short title.*—This Act may be cited as the Employers and Workmen Act, 1875.

2. [*Commencement of Act.*—This Act, except so far as it authorises any rules to be made or other thing to be done at any time after the passing of this Act, shall come into operation on the first day of September one thousand eight hundred and seventy-five.

#### PART I.

##### *Jurisdiction—Jurisdiction of County Court.*

3. [*Power of County Court as to ordering of payment of money set-off, and rescission of contract and taking security.*—In any proceeding before a County Court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act) the Court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers ; that is to say—

- (1.) It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the Court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise ; and,
- (2.) If, having regard to all the circumstances of the case, it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages

or damages, or other sums due thereunder, and as to the payment of wages or damages, or other sums due, as it thinks just ; and,

- (3.) Where the Court might otherwise award damages for any breach of contract it may, if the defendant be willing to give security to the satisfaction of the Court for the performance by him of so much of his contract as remains unperformed, with the consent of the plaintiff, accept such security, and order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded, or some part of such damages.

The security shall be an undertaking by the defendant and one or more surety or sureties that the defendant will perform his contract, subject on non-performance to the payment of a sum to be specified in the undertaking.

Any sum paid by a surety on behalf of a defendant in respect of a security under this Act, together with all costs incurred by such surety in respect of such security, shall be deemed to be a debt due to him from the defendant ; and where such security has been given in or under the direction of a Court of summary jurisdiction, that Court may order payment to the surety of the sum which has so become due to him from the defendant.

#### *Court of Summary Jurisdiction.*

4. [*Jurisdiction of Justices in disputes between employers and workmen.*]

—A dispute under this Act between an employer and a workman may be heard and determined by a Court of summary jurisdiction, and such Court for the purposes of this Act shall be deemed to be a Court of civil jurisdiction, and in a proceeding in relation to any such dispute the Court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a County Court : Provided that in any proceeding in relation to any such dispute the Court of summary jurisdiction—

- (1.) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds ; and,
- (2.) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the cost incurred in the case ; and,
- (3.) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties.

5. [*Jurisdiction of Justices in disputes between masters and apprentices.*]

—Any dispute between an apprentice to whom this Act applies and his master, arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act), may be heard and determined by a Court of summary jurisdiction.

6. [*Powers of Justices in respect of apprentices.*].—In a proceeding before

a Court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice the Court shall have the same powers as if the dispute were between an employer and a workman, and the master were the employer and the apprentice the workman, and the instrument of apprenticeship a contract between an employer and a workman, and shall also have the following powers :—

- (1.) It may make an order directing the apprentice to perform his duties under the apprenticeship ; and,
- (2.) If it rescinds the instrument of apprenticeship it may, if it thinks it just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid.

Where an order is made directing an apprentice to perform his duties under the apprenticeship, the Court may, from time to time, if satisfied after the expiration of not less than one month from the date of the order that the apprentice has failed to comply therewith, order him to be imprisoned for a period not exceeding fourteen days.

7. [*Order against surety of apprentice, and power to friend of apprentice to give security.*].—In a proceeding before a Court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, if there is any person liable under the instrument of apprenticeship for the good conduct of the apprentice, that person may, if the Court so direct, be summoned in like manner as if he were the defendant in such proceeding to attend on the hearing of the proceeding, and the Court may, in addition to or in substitution for any order which the Court is authorised to make against the apprentice, order the person so summoned to pay damages for any breach of the contract of apprenticeship to an amount not exceeding the limit (if any) to which he is liable under the instrument of apprenticeship.

The Court may, if the person so summoned, or any other person, is willing to give security to the satisfaction of the Court for the performance by the apprentice of his contract of apprenticeship, accept such security instead of or in mitigation of any punishment which it is authorised to inflict upon the apprentice.

## PART II.

### *Procedure.*

8. [*Mode of giving security.*].—A person may give security under this Act in a county Court or Court of summary jurisdiction by an oral or written acknowledgment in or under the direction of the Court of the undertaking or condition by which and the sum for which he is bound, in such manner and form as may be prescribed by any rule for the time being in force, and in any case where security is so given, the Court in or under the direction of which it is given may order payment of any sum which may become due in pursuance of such security.

The Lord Chancellor may at any time after the passing of this Act, and from time to time, make, and when made rescind, alter, and add to, rules with respect to giving security under this Act.

9. [*Summary proceedings.*].—Any dispute or matter in respect of which jurisdiction is given by this Act to a Court of summary jurisdiction shall be deemed to be a matter on which that Court has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Act, but shall not be deemed to be a criminal proceeding; and all powers by this Act conferred on a Court of summary jurisdiction shall be deemed to be in addition to and not in derogation of any powers conferred on it by the Summary Jurisdiction Act, except that a warrant shall not be issued under that Act for apprehending any person other than an apprentice for failing to appear to answer a complaint in any proceeding under this Act, and that an order made by a Court of summary jurisdiction under this Act for the payment of any money shall not be enforced by imprisonment except in the manner and under the conditions by this Act provided: and no goods or chattels shall be taken under a distress ordered by a Court of summary jurisdiction which might not be taken under an execution issued by a County Court.

A Court of summary jurisdiction may direct any sum of money, for the payment of which it makes an order under this Act, to be paid by instalments, and may from time to time rescind or vary such order.

Any sum payable by any person under the order of a Court of summary jurisdiction in pursuance of this Act, shall be deemed to be a debt due from him in pursuance of a judgment of a competent Court within the meaning of the fifth section of the Debtors Act, 1869, and may be enforced accordingly; and as regards any such debt, a Court of summary jurisdiction shall be deemed to be a Court within the meaning of the said section.

The Lord Chancellor may at any time after the passing of this Act and from time to time, make, and when made rescind, alter, and add to, rules for carrying into effect the jurisdiction by this Act given to a Court of summary jurisdiction, and in particular for the purpose of regulating the costs of any proceedings in a Court of summary jurisdiction, with power to provide that the same shall not exceed the costs which would in a similar case be incurred in a County Court, and any rules so made in so far as they relate to the exercise of jurisdiction under the said fifth section of the Debtors Act, 1869, shall be deemed to be prescribed rules within the meaning of the said section.

### PART III.

#### *Definitions and Miscellaneous.*

10. [*Definitions—"Workman."*].—In this Act—

The expression "workman" does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or

otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

*"The Summary Jurisdiction Act."*—The expression "the Summary Jurisdiction Act" means the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales with respect to summary convictions and orders," inclusive of any Acts amending the same.

The expression "Court of summary jurisdiction" means—

- (1.) As respects the city of London, the Lord Mayor or any alderman of the said city sitting at the Mansion House or Guildhall justice-room ; and,
- (2.) As respects any Police Court division in the metropolitan police district, any metropolitan police magistrate sitting at the Police Court for that division ; and,
- (3.) As respects any city, town, liberty, borough, place, or district for which a stipendiary magistrate is for the time being acting, such stipendiary magistrate sitting at a Police Court or other place appointed in that behalf ; and,
- (4.) Elsewhere any Justice or Justices of the Peace to whom jurisdiction is given by the Summary Jurisdiction Act : Provided that, as respects any case within the cognisance of such Justice or Justices as last aforesaid, a complaint under this Act shall be heard and determined, and an order for imprisonment made by two or more Justices of the Peace in petty sessions sitting at some place appointed for holding petty sessions.

Nothing in this section contained shall restrict the jurisdiction of the Lord Mayor or any alderman of the city of London, or of any metropolitan police or stipendiary magistrate in respect of any act or jurisdiction which may now be done or exercised by him out of Court.

11. [*Set-off in case of factory workers.*].—In the case of a child, young person, or woman subject to the provisions of the Factory Acts, 1833 to 1874, any forfeiture on the ground of absence or leaving work shall not be deducted from or set-off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work.

#### *Application.*

12. [*Application to apprentices.*].—This Act in so far as it relates to apprentices shall apply only to an apprentice to the business of a workman as defined by this Act upon whose binding either no premium is paid, or

the premium (if any) paid does not exceed twenty-five pounds, and to an apprentice bound under the provisions of the Acts relating to the relief of the poor.

*Saving Clause.*

13. [*Saving of special jurisdiction, and seamen.*].—Nothing in this Act shall take away or abridge any local or special jurisdiction touching apprentices.

This act shall not apply to seamen or to apprentices to the sea service.

PART IV.

*Application of Act to Scotland.*

14. [*Application to Scotland. Definitions.*].—This Act shall extend to Scotland, with the modifications following; that is to say,

In this Act, with respect to Scotland—

The expression "County Court" means the ordinary Sheriff Court of the county :

The expression "the Court of summary jurisdiction" means the Small Debt Court of the Sheriff of the county :

The expression "Sheriff" includes Sheriff-Substitute :

The expression "instrument of apprenticeship" means indenture :

The expression "plaintiff" or "complainant" means pursuer or complainer :

The expression "defendant" includes defender or respondent :

The expression "the Summary Jurisdiction Act" means the Act of the seventh year of the reign of His Majesty King William the Fourth, and the first year of the reign of Her present Majesty, chapter forty-one, intituled "An Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the Trial of Small Debt Causes by the Sheriffs in Scotland," and the Acts amending the same :

The expression "surety" means cautioner :

This Act shall be read and construed as if for the expression "the Lord Chancellor," wherever it occurs therein, the expression "the Court of Session by Act of Sederunt" were substituted.

All jurisdictions, powers, and authorities necessary for the purposes of this Act are hereby conferred on Sheriffs in their Ordinary or Small Debt Courts, as the case may be, who shall have full power to make any order on any summons, petition, complaint, or other proceeding under this Act that any County Court or Court of summary jurisdiction is empowered to make on any complaint or other proceeding under this Act.

Any decree or order pronounced or made by a Sheriff under this Act shall be enforced in the same manner and under the same conditions in and under which a decree or order pronounced or made by him in his Ordinary or Small Debt Court, as the case may be, is enforced.

## PART V.

*Application of Act to Ireland.*

**An ACT OF SEDERUNT in Relation to "The Employers and Workmen Act, 1875."—Edinburgh, 29th January, 1876.**

The Lords of Council and Session, in pursuance of the powers vested in them by "The Employers and Workmen Act, 1875" (38 & 39 Vict. c. 90), enact and declare :—

1. That in proceedings under the Act before the Small-Debt Court of the Sheriff, the forms set forth in the schedule hereto annexed, or forms as near thereto as circumstances permit, shall be used; and all citations, and executions of citation of parties or witnesses, shall be in the form, or as nearly as may be, of those in Schedule (A) of the Act 1 Vict. c. 41.

2. In so far as the forms in the schedule annexed hereto shall be inapplicable to the circumstances, the forms contained in Schedule (A) of the said Act, 1 Vict. c. 41, or as near thereto as circumstances will permit, shall be used.

3. All causes under the said "Employers and Workmen Act, 1875," and

the proceedings therein, shall be entered in the book mentioned in § 17 of the said statute, 1 Vict. c. 41, in the same way as in other cases under that Act; and the decrees or orders and warrants shall be annexed to the complaint or summons, and signed by the clerk.

4. No notice shall be required to be given by a defender of any set-off or counter-claim that he may wish to advance at the hearing against the claim of the pursuer.

5. The expenses shall be at the same rates as in the Small-Debt Court.

And the Lords appoint this Act to be inserted in the books of sederunt, and to be printed and published in common form.

JOHN INGLIS, I.P.D.

**SCHEDULE.**

*Summons or Complaint.*

(Under "The Employers and Workmen Act, 1875.")

A B, Sheriff of the shire of \_\_\_\_\_, To  
 \_\_\_\_\_, officers of Court, jointly and severally : Whereas it is humbly  
 complained to me by C D (*design him*), *pursuer*, against E F (*design him*),  
 [and G H, where cautioner is to be called (*design him*)], *defender*; That on  
 the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ the  
 pursuer and the defender entered into a contract [*or indenture as the case  
 may be*] whereby [*here state the nature of the contract or indenture, and the  
 period of its endurance*]; That the defender has neglected and refused to  
 fulfil the same by [*here state the breach of contract complained of*]; Therefore  
 it ought to be decerned and ordained [*here set forth the particular remedy  
 desired*]; [and add] or that the pursuer shall have such other remedy com-

petent under the said statute in respect of the defender's breach of contract as to the Court may seem just, with expenses. Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compare before me or my substitute in the Court-house at \_\_\_\_\_, upon the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ of the clock, to answer at the pursuer's instance in the said matter, with certification in case of failure of being held as confessed; and that ye cite witnesses and havers for both parties to compare at the said place and date to give evidence in the said matter [*here insert warrant to arrest, if desired, in actions with a pecuniary conclusion.*] Given under the hand of the Clerk of Court at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_  
*(Signed by Sheriff-Clerk.)*

*Decree in Absence.*

*(Place and Date.)*

Decerns in absence against the defender, in terms of the special conclusion of the summons above written, and for the sum of \_\_\_\_\_ of expenses; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after \_\_\_\_\_ free days.

*(Signed by Sheriff-Clerk.)*

*Order when Caution found.*

*(Place and Date.)*

In respect the defender has broken the contract libelled, and that the Court would have awarded to the pursuer the sum of £ \_\_\_\_\_ of damages, and that the defender has found caution in terms of "The Employers and Workmen Act, 1875," and that the pursuer consents, the Court accepts the same in place of the said damages [or the part thereof], and orders that the defender do perform so much of his contract as yet remains unperformed, and finds him liable [in the remaining sum of \_\_\_\_\_ of damages and] in the sum of \_\_\_\_\_ of expenses, and decerns; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after \_\_\_\_\_ free days.

*(Signed by Sheriff-Clerk.)*

*Bond or Enactment of Caution to be appended to the Complaint and Order.*

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_ 18 \_\_\_\_\_, in fulfilment of the preceding order, appeared *G H (design him)*, who hereby judicially binds himself, his heirs, executors, and successors, as cautioners for the defender *E F*, that the said defender will perform so much of the contract between the said *E F* and *O D* as yet remains to be performed; that is to say (*state what yet remains to be performed*). And the said *G H* and the said *E F* bind and oblige themselves, conjunctly and



severally, to pay to the said *C D* the sum of £                      in case the said defender fails to perform what he has hereby undertaken to perform.

*(Signed by the Party, Cautioner, and Sheriff-Clerk.)*

*Order on Apprentices.*

*(Place and date.)*

The Sheriff orders that the defender *E F* do forthwith perform the duties he has contracted to perform under his indenture to the pursuer, and finds him liable in                      of expenses, and decerns ; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by pointing and sale and imprisonment, if the same be competent, after                      free days.

*(Signed by Sheriff-Clerk.)*

*Order rescinding Contract of Apprenticeship.*

*(Place and date.)*

The Sheriff adjudges and decerns that the indenture made between the pursuer and the defender *E F* be rescinded, and that the defender [*or pursuer*] do pay to                      the sum of £                      , being the whole [*or a part*] of the premium paid on the binding of the defender [*or pursuer*] as apprentice to the pursuer [*or defender*]: Finds the                      liable in                      of expenses, and decerns ; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by pointing and sale and imprisonment, if the same be competent, after                      free days.

*(Signed by Sheriff-Clerk.)*

*Warrant of Commitment of Apprentice.*

*(Place and date.)*

The Sheriff having resumed consideration of this case, and having considered the proof adduced, finds that the defender has failed to comply with the order of the                      day of                      : Therefore grants warrant to commit the defender to the prison of                      for                      days (*not exceeding fourteen*), and grants warrant to officers of Court and the keeper of said prison accordingly.

*(Signed by Sheriff-Clerk.)*

*Order accepting Caution for performance of Duties.*

*(Place and date.)*

In respect *E F* the defender, has failed to perform his duties under his indenture, and that the Sheriff would have committed him to prison for a period of (*not exceeding fourteen*) days, and in respect that *G H* is willing to become cautioner to the amount of £                      for the said *C D* for the

due performance by him of his duties, the Sheriff directs such caution to be forthwith given instead of the said imprisonment: finds the defender liable in \_\_\_\_\_ of expenses, and decerns; and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent after free days.

*(Signed by Sheriff-Clerk.)*

*Bond or Enactment of Caution for an Apprentice, to be appended to the Complaint.*

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, in fulfilment of the preceding interlocutor. Compeared *G H (design him)*, who hereby judicially binds himself, his heirs, executors, and successors as cautioners for the defender *E F (design him)*, that the said *E F* will perform the whole duties that yet remain to be performed by him, under the indenture entered into between him and *C D*, of date the \_\_\_\_\_ day of \_\_\_\_\_ that is to say (*state what yet remains to be performed*); and the said *G H* and the said *E F* bind and oblige themselves, conjunctly and severally, to pay to the said *C D* the sum of £\_\_\_\_\_, in case the said defender fails to perform the duties yet to be performed by him under said indenture.

*(Signed by the Party, Cautioner, and Sheriff-Clerk.)*

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CHAPTER IV.—JUDICIAL FACTORS.

12 & 13 *Vict.* c. 51.—An ACT of Parliament for the Better Protection of the Property of Pupils, Absent Persons, and Persons under Mental Incapacity in Scotland.—28th July, 1849.

WHEREAS an Act of Sederunt was passed by the Court of Session in Scotland on the thirteenth day of February, one thousand seven hundred and thirty, setting forth that the Court had often been applied to for appointing factors on the estates of pupils not having tutors, and of persons absent who had not sufficiently empowered persons to act for them, or who were under some incapacity for the time to manage their own estates, to the end that the estates of such pupils or persons might not suffer in the meantime, but be preserved for the behoof of such persons and all having right therein, and therefore establishing certain regulations in regard to the conduct of such judicial factors, which regulations are

still in force : And whereas the applications to the Court of Session for the appointment of such factors have become very numerous ; and it has been found that the existing regulations and the present means of enforcing them are imperfect and insufficient for preventing in many instances the occurrence of great irregularity in the conduct of such factors, and in consequence thereof great loss has resulted to the funds and estates under their charge, and to the parties interested therein ; and it has therefore become necessary to make further provision in that behalf : And whereas it is also expedient to make provision for the more regular accounting and official management of persons who shall hereafter be served as tutor of law, or appointed as tutor-dative to any pupil, or be served as curator, or appointed as tutor-dative to any insane person or idiot : May it therefore please your Majesty that it may be enacted, and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same —

1. [*Interpretation of terms in this Act.*—That the following words and expressions in this Act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction—that is to say, the expression “Judicial Factor” or “Factor” shall mean factor *loco tutoris*, factor *loco absentis*, and curator *bonis*; the word “Tutor” shall mean any person who after the passing of this Act shall be served tutor of law to any pupil, or be appointed tutor-dative to any pupil or insane person or idiot; the word “Curator” shall mean any person who after the passing of this Act shall be served as curator to any insane person or idiot; the word “Accountant” shall mean the accountant of the Court of Session, to be appointed under the authority of this Act; the expression “Lord Ordinary” shall mean the Lord Ordinary of the Court of Session discharging the duties of Junior Lord Ordinary in time of session and the Lord Ordinary on the Bills in the time of vacation; the expression “Court of Session” or “Court” shall, excepting as to the power of passing Acts of Sederunt, mean either Division of the Court of Session; the word “Estate” shall include all property and funds, and all rights, heritable and moveable; the word “Lands” shall include all heritable subjects; words used in the singular number shall be held to include several persons or things, and words importing the masculine gender shall extend and be applied to females as well as males.

2. [*Judicial Factor to find caution for duly performing his duties.*—And be it enacted, That every judicial factor shall, within such time after his appointment as the Court shall direct, find caution for his duly accounting for his intrusions and management, and observing and performing every duty incumbent upon him as factor, in terms of the rules prescribed, or to be prescribed, for the discharge of his office, and in case of his failure to do so his appointment shall fall; and no factor shall enter upon the duties of his office, nor shall an extract of his appointment be issued, until

after such caution is found and received as sufficient ; and the factor shall extract his appointment without delay.

3. [*Judicial Factor to lodge with the accountant a distinct rental of lands committed to his management, a list of funds, and an inventory of moveables, &c.*].—And be it enacted, That every judicial factor shall, as soon as may be after extracting his appointment, and within six months at latest from the date on which his bond of caution shall have been received, lodge with the accountant a distinct rental of all lands committed to his management, specifying the rents, revenues, and profits of such lands, the existing leases, and other rights affecting the lands, and the public burdens and other burdens thereon, and a list of all moneys and funds belonging and debts due to the estate, specifying the particulars of each item, and the interest or revenue arising from the same, the document by which the same is vouched, and the nature and value of any security held for the same, and also an inventory of any household furniture, farm stocking, goods or moveables, including rights moveable, forming part of the estate ; and he shall, without delay, after extracting his appointment, recover all writs and documents of importance belonging to the estate, and collect all moneys due to the same not securely invested, and use all reasonable diligence in ascertaining the exact nature and amount of the estate placed under his charge ; and he shall produce all such writs and documents, and information so obtained by him, along with the said rental, list of funds, and inventory to the accountant, which rental, list and inventory, when adjusted and approved of by the accountant, shall be signed by him and the factor, and shall form a ground of charge against the factor ; and if at any time thereafter any new claims or property belonging to the estate shall be discovered, the factor shall report the same in his next account of charge and discharge to the accountant, who shall make such alteration on the rental, list, and inventory as may be thereby rendered necessary.

4. [*Factor to close his accounts once a-year, and lodge the same with accountant.*].—And be it enacted, That the factor shall close his account of charge and discharge once in every year, on a day to be fixed by the accountant, and within one month thereafter shall lodge such account in the office of the accountant, with the vouchers\* numbered, and referred to in the account by number : Provided always, that it shall be competent for the accountant, on cause shown, to prorogate the time for lodging such accounts and vouchers, but in no case shall such prorogation extend beyond three months from the day fixed for the closing of the accounts.

5. [*Factor to lodge moneys in one of the Banks of Scotland.*].—And be it enacted, That the factor shall lodge the money in his hands in some one of the banks in *Scotland* established by Act of Parliament or Royal Charter,

\* The lodging of separate inventories of vouchers, and of duplicates of factorial inventories and accounts, is dispensed with by A. S., 11th March, 1851.

in a separate account or on deposit, such account or deposit being in his own name as judicial factor on the estate ; and if the factor shall keep in his hands more than fifty pounds of money belonging to the estate for more than ten days, he shall be charged with a sum to the estate at the rate of twenty pounds *per centum per annum* on the excess of the said sum of fifty pounds, for such time as it shall be in his hands beyond the said ten days ; and unless the money has been so kept from innocent causes, the factor shall be dismissed from his office, and shall have no claim for commission.

6. [*Penalties on factor for misconduct.*].—And be it enacted, That if the factor shall misconduct himself, or fail in the discharge of his duty, he shall be liable to such fine, and to the forfeiture of the whole or any part of his commission, and to suspension or removal from his office as factor, and to payment of expenses, or to any one or more of such penalties, as the Court in its discretion shall decide ; and that over and above such further liability as he may be subject to, as accords of law, in reparation of any loss or damage sustained by the estate in consequence of such misconduct or failure.

7. [*Factor may apply for special powers.*].—And be it enacted, That if at any time it shall appear to the factor that there is a strong expediency for granting abatement of rent, either temporarily or permanently, or for renewing or granting a lease for a period of years, or for draining, or for erecting buildings or fences, or for otherwise improving the estate in a manner not coming within the ordinary course of factorial management, he shall report the same to the accountant, who may order any necessary inquiry, and shall state his opinion thereon in writing ; and such report and opinion may be submitted by the factor to the Lord Ordinary with a note praying for the sanction of the Court to the measure proposed ; and the Lord Ordinary shall, with or without further inquiry, report the matter to the Court, who if they consider it expedient and consistent with due regard to the amount of the estate at the time, may sanction the measure, and the decision of the Court shall be final, and not subject to appeal ; and if the estate be held under entail, it shall be lawful to the Court to authorise the factor to take proceedings for constituting as a charge against the future heirs of entail, or otherwise recovering, the money expended in making any improvements upon the estate, under and in terms of an Act passed in the tenth year of the reign of His Majesty King *George the Third* (10 Geo. III. c. 51), intituled *An Act to encourage the improvement of Lands, Tenements, and Hereditaments in that part of Great Britain called Scotland, held under settlements of strict entail*, and under and in terms of an Act passed in the Session of Parliament holden in the eleventh and twelfth years of the reign of Her present Majesty (11 & 12 Vict. c. 36), intituled *An Act for Amendment of the Law of Entail in Scotland* ; but nothing herein contained shall be held as conferring power on the Court to authorise the factor to build or enlarge a mansion-house upon the estate, or to charge the estate and

future heirs of entail to a greater extent than one-half the amount with which the heir in possession, if under no incapacity to act, could have charged the estate under the said Acts, or either of them ; and if any factor having charge of the estate of any lunatic or other person incapable of managing his own affairs, shall deem it proper for the comfort or welfare of such person that the whole or a part of such estate should be sunk on annuity, he shall report the matter to the accountant, who shall state his opinion thereon in writing, and such report and opinion shall be submitted by the factor, with a note as aforesaid, to the Lord Ordinary, who shall report the matter to the Court, and it shall be in the power of the Court to sanction the measure, and the decision of the Court shall be final and not subject to appeal ; and in all other matters in which special powers are, according to the existing practice, in use to be granted by the Court, the Court shall have power to grant the same in like manner and form as is above provided.

8. [*Before special powers, &c., granted, Court to order such intimation to be made as may be deemed proper.*]—And be it enacted, That in all cases in which application shall be made to the Lord Ordinary or the Court by any factor, or other person having right to make the same, for special powers, or for the extraordinary application of money or funds or property belonging to any estate, the Lord Ordinary or Court shall order such intimation to be made as may be deemed proper.

9. [*Power to appoint accountant.*]—And be it enacted, That it shall be lawful for Her Majesty and her heirs and successors to appoint a person versant in law and accounts, to be called the Accountant of the Court of Session, for performing the duties of that office, with such yearly salary, not exceeding six hundred pounds, payable quarterly out of the fee-fund established by this Act, and with such accommodation of office room, or reasonable allowance for the same out of the said fund, as may be fixed by the Commissioners of Her Majesty's Treasury, or any three or more of them, but such salary shall always be restricted so as not to exceed the clear existing proceeds of the aforesaid fee-fund after deducting all other charges thereon ; and the accountant shall be allowed two clerks, whom he shall appoint with a salary not exceeding two hundred pounds yearly for the first, and one hundred and fifty pounds yearly for the second, which salaries shall also be paid quarterly out of the said fee-fund ; and the accountant shall hold no other official situation in the Court, and shall not, directly or indirectly, by himself or any partner, be engaged in practice ; and he shall not, directly or indirectly, have any management of or intromission with any money of any estate under charge of the Court ; provided always that it shall be competent for the Court or for any Lord Ordinary to remit to the accountant to examine and report in regard to any matter depending before the Court or such Lord Ordinary not connected with his official duties, and in which it shall appear to the Court or such Lord Ordinary that the report of an accountant should be

obtained, and for such business the accountant shall be entitled to reasonable remuneration.

10. [*General nature of accountant's duty.*—And be it enacted, That the accountant shall superintend generally the conduct of all judicial factors and tutors and curators coming under the provisions of this Act, already appointed or to be hereafter appointed, and shall see that they duly observe all rules and regulations affecting them for the time.

11. [*To assign a day for closing first account.*—And be it enacted, That on the factor's bond of caution being received as sufficient, it shall be transmitted by the clerk to the process to the accountant, who shall forthwith give a written intimation, dated and signed, to the factor or his agent, stating that the bond has been received, and assigning the day on which the factor is to close his first account, being not less than six nor more than eighteen months from the date of such intimation; and on the death or insolvency of the cautioner of any factor, such factor shall forthwith give notice in writing to the accountant of such death or insolvency, and the accountant shall, as soon as the fact shall come to his knowledge, by means of such notice or otherwise, require new caution to be found.

12. [*To adjust the rental, list, and inventory.*—And be it enacted, That the accountant shall see that the factor lodges a rental, list, and inventory in terms of this Act, and shall, along with the factor or his agent, examine, verify, and adjust, and with the factor sign the same, and shall ascertain the circumstances of the estate, and call for all necessary documents, so as to form a clear rule of charge against the factor at the commencement of his office; and the accountant shall retain such rental, list, and inventory.

13. [*And to audit the accounts.*—And be it enacted, That the accountant shall see that the factor's accounts of charge and discharge, with the vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management, for the real benefit of the estate and of those interested therein, and he shall consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence, and he shall fix the amount of the factor's commission for the period embraced by the audit, according to his opinion of what is just in each particular case, and he shall strike the balance, and shall state the result of his audit in the form of a short report; and if he has made any corrections on the account, he shall, if required by the factor, explain such corrections and his reasons for making them.

14. [*Rules of exact diligence may be dispensed with.*—And be it enacted, That the accountant shall have power, upon report to and with the approval of the Lord Ordinary, where the sum involved exceeds twenty pounds, and without such report and approval where the sum involved is

less than twenty pounds, to dispense with the rules of exact diligence in any matter of factorial management.

15. [*Accountant's report conclusive against factor if not objected to, and if objections, how to be disposed of.*—And be it enacted, That the accountant's audit and report shall be conclusive against the factor and his cautioner, if written objections shall not be lodged by the factor with the accountant within twenty days from the date of such audit and report being communicated to the factor; but if objections be lodged, the accountant shall consider the same, and may alter his report if he sees cause; and unless the objections are allowed or departed from, the account and report and whole proceedings shall be transmitted by the accountant to the Lord Ordinary, who shall call the factor or his agent, and if necessary the accountant, before him at chambers in reference thereto; and the Lord Ordinary or the Court, if the matter shall be reported or brought under review, may affirm, vary, or reverse the audit and report of the accountant, and may reserve any question or questions which are raised in the objections for the factor till the final audit of his accounts, directing the account to be balanced for the present as the Lord Ordinary or the Court may think expedient and just; and no judgment of the Lord Ordinary, pronounced as aforesaid, shall be subject to review at the instance of the accountant, nor, in case the Lord Ordinary shall reserve any question as aforesaid, shall it be competent to the factor to reclaim against such reservation, but in case the Lord Ordinary shall decide against the factor, he may bring the interlocutor under review of the Court by a short note of appeal from the Lord Ordinary's judgment, and the judgment of the Court shall not be subject to appeal at this stage, nor till the termination of the factory, without the leave of the Court: Provided always, with reference to such discussion between the accountant and the factor, that at the audit of the factor's accounts, at the termination of his factory, it shall be competent to the factor and his representatives, or to any succeeding factor, or to any parties beneficially interested in the estate, to enter upon such matter of objection, if the same has been reserved, but if the same has been decided by the Lord Ordinary or the Court, the decision shall not be opened up except upon cause shown; and the factor shall not be entitled to charge the expense of any such proceedings against the estate without the special authority of the Lord Ordinary or the Court.

16. [*Cautioner may be heard before the accountant.*—And be it enacted, That it shall be lawful for the cautioner to appear and be heard before the accountant during the course of the audit, or to state objections to the audit within twenty days from the date of the report being intimated to the factor as aforesaid, unless the accountant shall grant further time, not exceeding six weeks; and for the purpose of stating such objections the accountant shall, if required, furnish to the cautioner a copy of his report; and the expense of such copy, and of any discussion that shall take place during or after the audit at the instance of the cautioner, shall be borne by the cautioner, and not by the estate: Provided always, that no objection



stated on the part of the cautioner shall be any ground for delaying any consignation of any balance ordered by the accountant, or otherwise giving immediate effect to the audit.

17. [*Parties interested may, upon cause shown, open up audit of accounts.*]—And be it enacted, That either at the termination of the factory or during its subsistence it shall be competent for any party beneficially interested in the estate, or for any succeeding factor, to make appearance, and upon cause shown to open up the audit of all accounts which have been audited by the accountant in absence of such party or succeeding factor, and also all questions in the accounting which have either not been submitted to the decision of the Lord Ordinary or the Court or been reserved, and also all questions which have been decided merely as between the accountant and the factor, or between the factor and some other beneficiary, reserving always to the factor and his representatives their answers and defences as accords of law ; but if such party or succeeding factor shall so appear, and such questions shall be opened up and decided, the judgment, if pronounced between the factor and a party beneficially interested, shall be final and conclusive as between them and their representatives, and if pronounced between the factor and succeeding factor, shall be final and conclusive against the factor and the estate.

18. [*Accountant to make an annual report of all judicial factories, which shall be printed.*]—And be it enacted, That the accountant shall make an annual report to the Court of Session, containing such particulars as he may think fit, or as the Court may, by Act of Sederunt or otherwise, require, of all judicial factories, whether granted before or after the passing of this Act, then subsisting or remaining unsettled, and of his own proceedings in reference to the same, and such annual report shall be printed at the cost of the fee-fund established by this Act.

19. [*Accountant to make requisitions and orders on the factor.*]—And be it enacted, That the accountant shall make all such requisitions and orders on the factor as he may consider necessary ; and if such requisition or order shall be disobeyed or neglected, he shall report the same to the Lord Ordinary, giving previous notice to the factor or his agent, who shall lodge objections in writing, if he any has, within forty-eight hours after such notice ; and the Lord Ordinary is hereby empowered, on considering such requisition or order, with the objections thereto, if any, to recall or vary, confirm or repeat, such requisition or order ; and the interlocutor of the Lord Ordinary shall be final and conclusive against the accountant, and also against the factor unless he shall at the time of pronouncing judgment give notice of his intention to bring the judgment under review, in which case the Lord Ordinary shall dispose of the matter of expenses, and give any interim order that may be necessary, which interim order shall not be subject to review.

20. [*And to report to the Lord Ordinary or the Court the factor's failure in duty.*]—And be it enacted, That the accountant shall, at all times when

requisite, report to the Lord Ordinary or the Court any disobedience of any requisition or order, and any misconduct or failure in duty on the part of a factor, or any claims arising against a dismissed factor or a factor's cautioner, or against the representatives of a factor or cautioner deceased; and it shall be competent for the Lord Ordinary or the Court, on the accountant's report, to deal immediately with the matter as accords of law.

21. [*When malversation reasonably suspected, a case to be submitted to Her Majesty's advocate.*—And be it enacted, That if the accountant shall possess information that shall lead him on reasonable grounds to suspect malversation or misconduct on the part of the factor, such as may infer removal or punishment, he shall be entitled to lay a case before Her Majesty's advocate, who shall have power to direct such inquiry and to take such proceedings, by petition and complaint, or otherwise, as he shall think proper.

22. [*Provision as to factories constituted before the passing of the Act.*—And be it enacted, with regard to all factories subsisting at the date of the passing of this Act, That if no inventory and rental has been lodged in terms of the aforesaid Act of Sederunt, the factor shall forthwith, after the passing of this Act, lodge a rental, list of funds, and inventory of moveables, in manner provided by this Act, and the same shall be adjusted and signed as also hereinbefore provided; and if his accounts shall be in arrear, he shall forthwith lodge the same, with the vouchers, in the manner provided by this Act, and the accountant shall audit his accounts in so far as not already audited; and the factor shall, in reference to all moneys which may come into his hands after the passing of this Act, consign the same in bank, in manner and under the penalties herein provided; and in reference to any balance which may be in his hands at the date of the passing of this Act, he shall consign the same in bank at latest before the first day of June one thousand eight hundred and fifty, after which date the provisions of this Act for consigning money shall apply to such factor in all respects; and in all other respects the whole provisions of this Act shall take effect from and after the passing thereof, in regard to factories constituted before the passing of this Act, in so far as the same admit of application thereto.

23. [*Provision as to past factories informally settled or desperate.*—And be it enacted, in regard to all factories constituted before the passing of this Act, That any settlement made of any such factory, though informal, shall be held as a *prima facie* discharge to the factor, and the accountant shall not report the same as a subsisting factory, or require further proceedings therein, but reserving the right of all parties interested in the estate to show cause to the accountant or the Court why such settlement should not be held as a discharge to the factor, in which case, if the cause shown shall be satisfactory to the accountant or the Court, the factory shall be held as subsisting, and be proceeded with; and in any such factory in which, though there has been no settlement it shall appear that no benefit is likely to be derived by the parties interested in the estate from further

proceedings therein, and no party interested shall make appearance and require such proceedings, the accountant shall place amongst the papers connected with the estate a memorandum of the circumstances, and shall state in his report that further proceedings are for the present inadvisable.

24. [*Power to Treasury to appoint additional clerks to bring up arrears.*—And whereas there is at present a great arrear in auditing the accounts of judicial factors in the factories now existing, and it may be beyond the power of the accountant to bring up such arrear with the aid only of his ordinary establishment: Be it enacted, That it shall be lawful for the Commissioners of Her Majesty's Treasury, or any three or more of them, to appoint such additional clerks as may be required for that purpose, but during such time only as such additional assistance shall be required for such purpose, and to permit such clerks to be remunerated out of the fund hereby established, by salary or otherwise.

25. [*Provisions of the Act made applicable to tutors of law, tutors-dative, and curators to insane persons.*—And be it enacted, That except as to the mode of appointment and caution, the provisions of this Act relating to judicial factors, or relating to the office, powers, and duties of the accountant appointed by this Act, shall be applicable, in so far as the same admit of application, to every person who after the passing of this Act shall be served tutor of law to any pupil, or appointed tutor-dative to any pupil or insane person or idiot, or served curator to any insane person or idiot.

26. [*Bonds of caution for tutors and curators.*—And be it enacted, That from and after the passing of this Act, in every service of a person as tutor of law to a pupil, or as curator to an insane person or idiot, there shall, besides the obligations usually inserted therein, be inserted in the bond of caution taken by the clerk in such service an obligation to observe and perform every duty incumbent on such persons, in terms of the rules prescribed or to be prescribed for the discharge of his office in all respects, together with a consent to registration in the books of council and session for execution; and such bond of caution shall be transmitted, with the other steps of procedure, to the Director of Chancery, who shall forthwith transmit the same to the accountant; and no extract of the retour in such service shall be given out, nor any letters of tutory or curatory be issued thereon, until such bond of caution shall have been received by the Director of Chancery; and in bonds of caution to be taken in the Court of Exchequer from tutors-dative to pupils, or insane persons, or idiots, there shall, besides the usual obligations, be inserted an obligation to the effect aforesaid; and such bonds of caution shall remain in the Court of Exchequer according to the rules of that Court.

27. [*Amount of caution for factors, &c., may be limited, and bonds of caution by guarantee associations, &c., taken.*—And be it enacted, That it shall be lawful for the Court of Session or Court of Exchequer, as the case may be, to limit, upon cause shown, the caution to be found by factors and tutors and curators to a specified amount, and also to authorise, if they

shall deem it expedient, bonds or policies of the *British Guarantee Association*, or other public company incorporated by Act of Parliament or Royal Charter carrying on guarantee business within *Scotland*, to be accepted and taken instead of bonds of caution by private individuals.

28. [*Certified copy of letters of tutory or curatory to form the basis of a summary process.*].—And be it enacted, That whenever the Director of Chancery shall issue letters of tutory or curatory, proceeding on any service or gift dated after the passing of this Act, he shall transmit a certified copy of such letters to the accountant, who, after making an entry thereof in his books, shall transmit the same to one of the principal Clerks of Session in order of seniority and by rotation ; and such certified copy, when so transmitted, shall be held as establishing a summary process in regard to the estate to which such letters relate, before that division of the Court to which such clerk shall belong, to the same effect as if the tutor or curator to whom such letters are issued had been appointed judicial factor by the Court on a petition in ordinary form ; and such certified copy shall be held for the purposes of this Act as equivalent to such appointment.

29. [*Tutors, &c., served before the passing of this Act may put themselves under its provisions.*].—And be it enacted, That any person who, before the passing of this Act, shall have been served tutor of law to any pupil, or appointed tutor-dative to any pupil or insane person or idiot, or served curator to any insane person or idiot, shall, with consent of his cautioner, have right, at any time during the continuance of his office, to place himself and his cautioner and the estate under the provisions of this Act, by presenting to the Director of Chancery a written statement of his desire to that effect, signed by himself and his cautioner, and duly attested, and the Director of Chancery shall retain such statement, and shall transmit a certified copy thereof, and of the letters of tutory or curatory issued to the applicant, to the accountant, who shall transmit the same to one of the principal Clerks of Session in the manner aforesaid, and such certified copies when so transmitted shall be held as establishing a summary process in regard to the estate as aforesaid, and the whole provisions of this Act shall thereafter be applicable to the said tutor or curator and his cautioner and the estate, in the same manner as if such tutor or curator had been served or appointed after the passing of this Act, and the tutor or curator and his cautioner shall be held as bound for due fulfilment of all the provisions of this Act accordingly.

30. [*Rental, list, and inventory to be equivalent to tutorial or curatorial inventory.*].—And be it enacted, That the rental, list, and inventory lodged with the accountant in terms of this Act by any tutor or curator as aforesaid, shall be held as equivalent to the tutorial or curatorial inventory directed to be given up by an Act of the *Scottish Parliament* passed in the year one thousand six hundred and seventy-two, intituled *Act concerning Pupils and Minors, and their Tutors and Curators*, and the report of any additional funds or property belonging to the pupil or insane person or idiot, in terms

of this Act, shall be held as equivalent to an eik to a tutorial or curatorial inventory in terms of the said recited Act, which is hereby repealed in so far as may be necessary to give effect to those enactments, but no further.

31. [*Resignation and removal of tutors and curators.*].—And be it enacted, That the Court shall have power, on cause shown, to remove or accept the resignation of any tutor or curator coming under the provisions of this Act, and to appoint a factor *loco tutoris* or curator *bonis* in his room.

32. [*Remuneration and responsibility of factors and curators not altered.*].—And be it enacted, That nothing herein contained shall be held to confer on any such tutor or curator a right not now existing in law to remuneration for the discharge of the duties attached to his office, or to limit his powers or alter the rules of his responsibility as by law now existing, excepting in so far as is herein expressly provided.

33. [*Power to accountant to require information from Banks.*].—And be it enacted, That the accountant shall have power to require the officers of any bank with which any factor or tutor or curator shall have opened an account for the estate under his care, to exhibit all entries in the books of such bank connected with such estate; and the officers of such bank are hereby required to exhibit the same accordingly, and to allow the accountant to take such copies thereof as he may require.

34. [*Discharge of factors, tutors, and curators.*].—And be it enacted, That it shall be competent for any factor, tutor, or curator, at the termination of his office, to present a petition to the Court for his discharge, calling all persons interested in the estate, so far as known to him, as parties to such petition, and the Court shall order such intimation and service as they may think fit; and it shall be competent to any persons so called, or to any other persons showing right and interest, to appear as parties, and upon cause shown to open up the audit of the factor's accounts, and thereafter, and after receiving the report of the accountant, and making any further inquiry which may be necessary, the Court shall pronounce judgment thereon; and such judgment, if it shall discharge such factor, tutor, or curator, shall be final and conclusive against all parties concerned, though pronounced in absence, provided the same shall not be opened up as a decree in absence in the Court of Session within the time limited for appealing to the House of Lords, or shall not be appealed from within that time.

35. [*Accountant to be custodian of bank receipts.*].—And be it enacted, That the accountant shall be the custodian of all bank deposit-receipts and other vouchers for sums of money already placed or to be hereafter placed in bank under authority of the Court, and of all judicial bonds of caution and other judicial bonds granted or to be granted under the authority of the Court, or any of the Judges thereof, or in reference to the business thereof, and all other documents of a like nature which according to the present law or practice are intrusted to the keeping of the senior principal

Clerk of Session, who after the commencement of this Act shall cease to discharge his present duty as custodier of such documents, and shall transfer all such documents as are in his possession to the accountant; and thereafter the clerk in each process in which consignment is made shall lodge all such bank receipts and bonds or vouchers in the hands of the accountant, whose acknowledgment therefor shall be an acquittance to such clerk.

36. [*Records in the accountant's office to be open for inspection.*].—And be it enacted, That the whole records and papers relating to factories, tutories, and curatories retained in the accountant's office shall be open to inspection on payment of such fees as may be fixed by the Court; but shall remain in the office, and not be lent out unless under authority of the Court or of the Lord Ordinary, and copies therefrom, attested by the accountant, shall have the same authority as the originals themselves, and shall be furnished to any party requiring the same on payment therefor of such fees as may be fixed by the Court; and such fees for inspection and attested copies shall be paid weekly by the accountant into the fund hereinafter established.

37. [*Banks to accumulate principal and interest on accounts and deposits.*].—And be it enacted, That from and after the passing of this Act every bank in *Scotland* with which any money shall have been or shall be deposited or lodged by any judicial factor, tutor, or curator, or under authority of any Court in *Scotland*, or with reference to any suit in any Court in *Scotland*, whether on deposit-receipt or on account current, or otherwise, shall, once at least in every year, accumulate the interest with the principal sum, so that both shall thereafter bear interest together as principal; and any bank failing so to do shall be liable to account as if such money had been so accumulated.

38. [*Provision for accountant's illness or temporary absence.*].—And be it enacted, That in case of the illness or temporary absence of the accountant, the Lord President of the Court of Session, or other Judge acting as President for the time, may authorise any one of the accountant's clerks, or other qualified person, to discharge the duties of the accountant for the time.

39. [*Establishment of fee-fund.*].—And be it enacted, That for establishing the fee-fund hereinbefore mentioned, there shall be payable by each estate under charge of a judicial factor, and by each estate of a pupil to whom a tutor of law shall hereafter be served, and by the estate of every pupil, insane person, or idiot to whom a tutor-dative shall hereafter be appointed, and by the estate of every insane person or idiot to whom a curator shall hereafter be served as aforesaid, and by all other estates or parties whom the Court may deem to have benefit from the services of the accountant, such fees as shall from time to time be authorised by the Court, having due regard to the sums required for the purposes of this Act, and to the interests of the estates to be benefited thereby; and such fees shall be lodged by the accountant at least once in every week in that bank in

*Edinburgh* which for the time shall be employed by Government to transact its business there; and such fees, with any interest accruing thereon, shall form a fee-fund, out of which the accountant shall draw and pay his own salary and the other salaries herein directed to be paid, and the whole expenses attending his office and duties; and the accountant shall annually exhibit an account of his intromissions with the said fee-fund to the Queen's and Lord Treasurer's Remembrancer of the Court of Exchequer in *Scotland*, who is hereby required to examine and audit such account, and thereafter to submit the same to the Lord President of the Court of Session, with a view to the reconsideration by the Court of the fees then in use to be charged; and such fees shall be so regulated, increased, or diminished by the Court from year to year, or oftener, as to keep up the fee-fund to an amount sufficient for answering the charges thereon, and for providing such reserved fund as may be necessary to meet the current and contingent expenses of the establishment; and any surplus arising on such fee-fund shall be paid over to the said Queen's and Lord Treasurer's Remembrancer, and remain in his hands to meet the future charges in such fee-fund; and the accountant shall enter into bond to Her Majesty with surety for his intromissions to the satisfaction of the said Queen's and Lord Treasurer's Remembrancer, and to such amount, and either by a public company or private individual, as to him may seem proper.

40. [*Power to pass Acts of Sederunt.*].—And be it enacted, That it shall be competent to the Court of Session, and they are hereby authorised and required, from time to time to pass such Acts of Sederunt as shall be necessary or proper for the further regulation of the manner of appointing judicial factors, and the manner of discharging their duty, and the manner of discharging the duties of the accountant, and the manner of applying the provisions of this Act to the case of tutors and curators, and the forms of process to be used in pursuance of this Act, and the manner of verifying by affidavit, declaration, certificate, or otherwise, the sufficiency of the caution offered for factors, tutors, and curators, and all other matters requisite for more effectually carrying out the purposes of this Act.

41. [*Act may be amended, &c.*].—And be it enacted, That this Act may be amended or repealed by any Act to be passed during the present session of Parliament.

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**43 & 44 Vict. c. 4.—An ACT to provide for the Appointment of Judicial Factors in Sheriff Courts in Scotland.—9th July, 1880.**

WHEREAS an Act was passed in the session of the twelfth and thirteenth years of the reign of Her present Majesty, chapter fifty-one, intituled "An Act for the better protection of the property of pupila, absent persons, and persons under mental incapacity in Scotland:"

And whereas it is expedient that Sheriffs in Scotland should be empowered to appoint judicial factors in cases of estates of small value :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*—This Act may be cited for all purposes as the Judicial Factors (Scotland) Act, 1880.

2. [*Commencement of Act.*—This Act shall commence to have effect on the first day of January one thousand eight hundred and eighty-one, which day is hereinafter referred to as the commencement of this Act.

3. [*Interpretation of terms.*—In this Act the following words and expressions shall have the meanings hereinafter assigned to them, unless there be something in the subject or context repugnant to such construction ; that is to say—

The expression “Judicial Factor” shall mean factor *loco tutoris* and curator *bonis* :

The expressions “Accountant of the Court of Session” or “Accountant” shall mean the Accountant of the Court of Session appointed under the recited Act :

The expression “prescribed” means prescribed by the regulations which the Court of Session are by this Act authorised to make from time to time by Act of Sederunt :

The expression “Lord Ordinary” shall mean the Lord Ordinary in the Court of Session discharging the duties of Junior Lord Ordinary in time of session, and the Lord Ordinary on the Bills in the time of vacation :

“Estate” shall include all property and funds, and all rights heritable and moveable.

4. [*Sheriff empowered to appoint judicial factors in small estates.*—From and after the commencement of this Act it shall be competent for Sheriffs in the several Sheriff Courts in Scotland, or for their Substitutes, and they are hereby authorised and empowered, to appoint judicial factors in cases of estates the yearly value of which (heritable and moveable estate being taken together) does not exceed one hundred pounds, and every Sheriff and Sheriff-Substitute respectively shall have and may exercise over and with regard to judicial factors appointed in the Sheriff Court the same powers and authorities that under the recited Act either Division of the Court of Session or the Lord Ordinary respectively have and may exercise under the recited Act over and with regard to judicial factors appointed in the Court of Session ; and for the purposes of this enactment the following provisions shall have effect ; that is to say—

(1.) Until otherwise prescribed, proceedings for appointment of judicial factors in the Sheriff Court shall commence by petition to be presented to the Sheriff or Sheriff-Substitute of the county in which



the pupil or insane person is resident, as nearly as may be in the form in use in ordinary actions in that Court, and shall thereafter be conducted therein as nearly as may be in the same form and manner in which proceedings under the recited Act are conducted before the Lord Ordinary :

- (2.) In estimating the yearly value of the estate, the yearly value of any lands and heritages shall be taken to be the yearly rent or value of the same as entered in the valuation roll for the county or burgh in which the same are situated in force for the time under the provisions of the Act of the session of the seventeenth and eighteenth years of the reign of Her present Majesty, chapter ninety-one, and the Acts amending the same, and the yearly value of any moveable estate shall be taken to be the amount of the yearly interest on the estimated value of the same at four pounds per centum per annum ; and the yearly value of any estate, or any portion thereof, which cannot be ascertained in either of the foregoing manners, shall be ascertained in such manner as the Sheriff or Sheriff-Substitute shall think fit :
- (3.) Before appointing a judicial factor on any estate under the provisions of this Act the Sheriff or Sheriff-Substitute shall be satisfied, by reasonable evidence adduced before him, that the yearly value of such estate (heritable and moveable estate being taken together) does not exceed one hundred pounds ; and in making any such appointment he shall make a finding in his interlocutor to that effect, which shall be final ; and no such appointment once made shall fall in respect of it afterwards appearing that such yearly value did exceed one hundred pounds :
- (4.) Subject to such rules as may from time to time be made by Act of Sederunt as hereinafter provided, the whole provisions of the recited Act, and any Acts amending the same, and any Acts of Sederunt made in terms thereof applicable to judicial factors appointed in the Court of Session shall apply as nearly as may be to judicial factors appointed in the Sheriff Court :
- (5.) In all cases of any appeal or reclaiming note being competent from a determination of the Lord Ordinary in the Court of Session to a Division of the Inner House of that Court, an appeal shall be competent in the like cases from a determination by a Sheriff-Substitute to the Sheriff, and in all cases of the accountant of the Court of Session being bound to make any report to the Lord Ordinary in the Court of Session he shall be bound in the like case to make his report to a Sheriff or Sheriff-Substitute :
- (6.) Until otherwise prescribed, proceedings in the fixing of caution, in applying for special powers, in the auditing of accounts, in the exoneration and discharge or removal of judicial factors, and all other proceedings necessary for the management of the estates

dealt with under this Act, shall be taken in the Sheriff Court in as nearly as may be the same form and manner in which the like proceedings are taken before the Lord Ordinary :

- (7.) It shall be the duty of the accountant, when it appears to him that there is a diversity of judgment or practice in proceedings in judicial factories in the Sheriff Courts which it would be important to put an end to, to report the same to the First Division of the Court of Session, specifying the proceedings in which such diversity appeared, and asking for a rule to be laid down to secure uniformity of judgment or practice in such proceedings, and the Court shall consider such report, and if they shall see fit shall lay down such a rule accordingly, which rule the several Sheriffs and their Substitutes shall be bound to observe :
- (8.) Decrees in absence shall not be opened up after the elapse of twelve months :
- (9.) It shall be competent for the Sheriff or for the Court of Session, upon the application of any person interested, to recall any appointment made under this Act :
- (10.) The decision of the Sheriff in all cases under this Act shall be final, and the decision of the Court of Session in all applications for recall of appointments under this Act shall be final.

5. [*Power to pass Acts of Sederunt.*].—It shall be competent to the Court of Session, and they are hereby authorised and required, from time to time to pass such Acts of Sederunt as shall be necessary or proper for regulating or prescribing the manner of appointing judicial factors in the Sheriff Courts, and of finding caution by such judicial factors, and the manner in which such judicial factors shall discharge their duties, and the manner in which the accountant shall discharge his duties, and the forms of process to be used in pursuance of this Act, and the manner of verifying by affidavit, declaration, certificate, or otherwise the sufficiency of the caution offered for judicial factors in the Sheriff Courts and all other matters requisite for more effectually carrying out the purposes of this Act.

6. [*Fees payable by estates deriving benefit from Act.*].—There shall be payable into the fee-fund established under the recited Act, by each estate under charge of a judicial factor appointed under this Act, such fees as shall from time to time be authorised by the Court of Session, having due regard to the sums required for the purposes of this Act and to the interests of the estates to be benefited thereby ; and out of the said fee-fund it shall be lawful for the Lords Commissioners of Her Majesty's Treasury to make such additions as they shall think fit to the salaries of the accountant and clerks appointed and acting under the recited Act, and to grant such salary or salaries as shall seem proper to any other clerk or clerks whom the said Commissioners shall think fit to appoint for the purposes of this Act.

ACT of SEDERUNT regulating the Appointments of  
Judicial Factors in the Sheriff Courts of Scotland.—  
14th January, 1881.

The Lords of Council and Session, in pursuance of the powers vested in them by sections 5 and 6 of the Act of the 43rd and 44th year of Her Majesty Queen Victoria, cap. 4, being the Judicial Factors (Scotland) Act, 1880, do hereby provide and enact that—

1. All applications under the said Act shall be disposed of summarily.

2. Such applications shall not fall asleep by lapse of year and day. Applications for special powers, renewal, interim, audit, recal, removal, and discharge shall form steps in the original process.

3. The first order in every such application shall be intimation by copy of petition on the walls of the Sheriff Court and to the accountant of the Court of Session, and such service on those having interest as may be deemed proper by the Sheriff, and for answers. The Sheriff may appoint service to be made by registered letter, and he may direct notice by advertisement of the application to be made in terms of Schedule I. appended hereto.

4. The accountant, on receiving intimation of an application for the appointment of a factor, shall, in the event of an application for similar appointment to the same wards or estate having been previously intimated to him, forthwith, as soon as possible, report the same to the Sheriff-Clerk, and shall communicate any information he may possess which may be of use to the Sheriff in disposing of the application.

5. All appointments shall be made with only the usual powers, and be conditional upon the person appointed finding satisfactory caution as after provided. When not otherwise expressed in the interlocutor, the time allowed for finding caution shall be limited to three weeks from the date of appointment, but the Sheriff may, on motion made before the expiry of that period, and on cause shown, allow further time for finding caution. Should

caution not be found within the time allowed, the appointment shall *ipso facto* fall.

6. When the cautioner is a private person, caution shall be found to the satisfaction of the Sheriff-Clerk. A form of bond is appended hereto. After the bond has been executed by the factor and his cautioner or cautioners, he shall procure one or more certificates by a Justice of Peace of the county in which the cautioner resides or carries on business in the terms appended, and thereupon the petitioner's agent shall add a certificate in the terms also appended, and the Sheriff-Clerk shall add the words "Caution received by me," with his signature and date. When the Sheriff authorises caution in terms of section 27 of the Pupils Protection Act, the receipt for the premium must be called for by the Sheriff-Clerk when it becomes due, and the payment or non-payment of the premium shall be forthwith reported to the accountant. If caution under said section be found, the company shall be taken bound to intimate the non-payment of the premium to the accountant. Where new caution has to be found in the course of factorial management, these provisions shall also apply and be observed. No factor shall be entitled to act until he has obtained extract.

7. After the Sheriff-Clerk shall have added his docket he shall transmit the bond of caution to the accountant, and the Sheriff-Clerk may thereafter issue an extract in the case of an appointment.

8. On the death or insolvency of a cautioner, or non-payment of a premium, the factor, and whenever it

comes to his knowledge the Sheriff-Clerk, shall forthwith give notice in writing thereof to the accountant, who shall require new caution to be found, and if his requisition be not complied with he shall lay the matter before the Sheriff, in order that the Sheriff may order new caution within a specified time, in terms of section 6, or appoint a new factor, who shall find caution and obtain extract, all conform to these regulations.

9. When the factor desires special powers, he shall submit an application in writing in the first instance to the accountant, who, after making such inquiries as may appear to him to be proper, shall put his opinion in writing, that the same may be laid before the Sheriff, who after intimation and service as aforesaid, and such procedure as he may think necessary, shall deal with and dispose of the factor's application. Special powers shall not be granted in any case until the factor has extracted the decree of his appointment.

10. When the factor desires to be discharged he shall lodge a note in process, which the Sheriff shall order to be intimated and served as aforesaid. The factor's application shall there-

after be sent to the accountant, who shall report his opinion in writing to Sheriff, who shall deal with and dispose of the application.

11. For the purposes of the Judicial Factors (Scotland) Act 1880, the words "Twenty-five" shall be substituted for the word "Fifty" in the fifth section of the Pupils Protection Act (12 & 13 Vict. cap. 51), and the word "Sheriff" shall be substituted for the words "Lord Ordinary" and "the Court" in the said Pupils Protection Act.

12. All outlays by the accountant and Sheriff-Clerk and office fees in the factory shall form a charge against the estate, and shall be satisfied and paid by the factor, unless the Sheriff shall see cause to subject the factor personally in the whole or any part thereof, in which case the factor shall be bound to relieve the estate of such outlay.

13. There shall be payable into the fee-fund established under the Pupils Protection Act, by each estate under charge of a factor, the fees fixed by and exigible under Act of Sederunt of 1st February, 1850.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

JOHN INGLIS, I.P.D.

## SCHEDULES.

### SCHEDULE I.

Notice is hereby given to all having interest, that application has been made to the Sheriff of \_\_\_\_\_ for the appointment of *A B* [*design him*], as factor *loco tutoris* [*or curator bonis, as the case may be*] to *C D*, &c. [*design him or them*], or by *A B*, factor *loco tutoris* to, or as curator *bonis* to *C D*, &c., for special powers to do, &c., or for discharge of his said office [*as the case may be*], in terms of the Judicial Factors (Scotland) Act, 1880 (43 & 44 Vict. c. 4); and answers fall to be lodged with me on or before the day of \_\_\_\_\_

*E F*, Sheriff-Clerk.

### SCHEDULE II.

I, *A B* [*design him*], considering that by interlocutor, dated \_\_\_\_\_, the Sheriff of \_\_\_\_\_ nominated and appointed

me to be factor *loco tutoris* or curator *bonis* [as the case may be] to *C D* [design him or her], with the usual powers, I always finding caution before extract, and seeing that I am willing to accept the said office, and to find caution in terms of said interlocutor [or if caution requires to be found of new, And seeing that I have been called upon to find caution of new, and am willing to do so]: Therefore I, the said *A B*, as principal, and I, *E F*, as cautioner, surety, and full debtor for and with the said *A B*, and we both, principal and cautioner, do hereby bind and oblige ourselves and our respective heirs, executors, and successors whomsoever, conjunctly and severally, renouncing the benefit of discussion, that I, the said *A B*, shall do exact diligence in performing my duty as factor *loco tutoris* or curator *bonis* foresaid [as the case may be], and shall render just accounts of my intromissions and management in relation to the premises, and make payment of whatever sum or sums of money shall be found justly due and resting-owing by me, and that to such person or persons as shall be found to have best right thereto, and that I shall observe and perform every duty incumbent upon me as factor *loco tutoris* or curator *bonis* foresaid [as the case may be], in conformity to and in terms of the rules and instructions prescribed or to be prescribed for the discharge of my said office, or that I shall be otherwise liable to in law; and I, the said *A B*, bind and oblige myself and my foresaids to free and relieve my said cautioner and his foresaids of their cautionary obligations for me in the premises and of all the consequences thereof, and we both, principal and cautioner, consent to the registration hereof for preservation and execution. [If the factor or his cautioner be resident beyond the jurisdiction of the Sheriff who makes the appointment, a clause will be added prorogating the jurisdiction of the Sheriff as regards the obligations undertaken in this bond, and holding the Sheriff-Clerk's office as the place where he or they shall be cited in any action or proceeding connected with the factory or curatory.]—In witness whereof, &c.

I, \_\_\_\_\_, one of Her Majesty's Justices of the Peace for  
the \_\_\_\_\_ of \_\_\_\_\_ certify that *E F*, the cautioner  
offered in the foregoing bond, is reputed sufficient for the obligations  
thereby undertaken, dated at \_\_\_\_\_ the  
day of \_\_\_\_\_

(Signed) *G H, J.-P.*

I, agent for the petitioner, have made due inquiry, and without becoming bound as attestator, I am satisfied that *E F*, the cautioner offered, is sufficient and ought to be received. The principal and his cautioner are not in partnership, and neither of them is a creditor of the ward or the ward's father or mother or other ancestor of the ward.

(Signed) *J K.*

Dated at                      the                      day of                      in the  
year eighteen hundred and

(Signed)                      *L M*,  
Sheriff-Clerk of the county of  
(Not a Sheriff-Clerk Depute.)

[Date.]

### III.—NOTES AND FORM OF ACCOUNT FOR THE GUIDANCE OF JUDICIAL FACTORS, ISSUED BY THE ACCOUNTANT OF COURT.

*Under the Pupils Protection Act, 12 & 13 Vict. cap. 51,  
and 43 & 44 Vict. cap. 4.*

*Special reference is made to the Act of Sederunt of 14th January, 1881  
[supra].*

#### I. ACCOUNTS.

##### 1. *Body of the account and its appendices.*

(1.) [*Charge side of an account.*].—The most conclusive form is for the factor to commence by charging himself with the whole estate ; that is—(1) Whole funds, arrears, balances, and whatever belonged to the estate according to inventory, or at the closing date of the preceding account. By this means no part of the funds can be lost sight of or omitted without affecting the balance. (2) Revenue will then follow, of whatever description that has become payable within the period embraced by the account, including the whole rental and arrear, if any, properly branched, and narrating distinctly, in each entry, the data requisite to check its accuracy ; such as dates, periods, rates of interest, or dividends, stock amounts, &c. The main distinction is between capital and revenue. The elements that come under these two must never in any measure be mixed, though each branch may be more or less subdivided.

(2.) [*Discharge side of an account, branched as follows.*].—Public burdens, repairs, interest of debt, payments on account of the ward, investments made, debt paid off, improvements, expenses of management, and lastly, funds, balances, and arrears outstanding, or actual amount and particulars of the estate, as at the date on which the account closes.

2. [*Account-current or cash account.*].—Every factor of course keeps a cash book, and unless there is a progressive interest state, a transcript with the

dates from his cash-book is requisite as an appendix to the factor's account of charge and discharge. This, of course, must balance with his account of charge and discharge.

3. *New Claims* arising, or property discovered to belong to the estate after the inventory has been lodged, should be specially reported and explained in the annual account next following the discovery, and taken into the vidimus of funds.

4. [*Vidimus.*—Each annual account of charge and discharge must either contain or be followed (as an appendix) by a vidimus. In either case, the vidimus must embrace the entire estate—that is, all funds and balances as subsisting on the exact date of closing the account, including arrears, if any. When the vidimus is embraced within the account, the accuracy of the whole is proved by the balance of the account. When the vidimus is separate, the factor must test and prove its accuracy, by reconciling it with the vidimus of the year preceding.

5. [*Dates.*—(1) The annual closing date must be rigidly adhered to, unless in the event of the death of the factor or ward, or of a pupil reaching minority, or other event terminating the factory, when the account must be closed and balanced, and the exact amount of the estate ascertained, as at that date. If the pupil reaching minority be one of several, the accounts must be also balanced at the subsequent annual closing date. (2) In all accounts, whenever the nature of entries admits of it, the dates must be given. (3) False dates, or intrusions of a date subsequent to the closing date of the accounts, cannot be admitted.

6. [*Signatures.*—Accounts must be signed by the factor, and also the states or accounts of sub-factors; also all separate explanations, though these latter will very rarely be requisite if accounts have been accurately kept and are properly stated.

7. [*Vouchers.*—(1) The vouchers must be properly arranged, backed and numbered, and referred to by the number in the account of charge and discharge. (2) Must refer to the factorial estate, as distinct from the factor's private affairs, and be accompanied by any detailed accounts of which they form the discharge. (3) The entry or narrative in the account must express the transaction in simple accordance with fact, and with the vouchers, and fully. (4) Particular attention is called to the necessity, in the payment of board, of stating the name and address of the party with whom the pupil or lunatic is boarded. (5) States unsigned, or a bank account uncertified, cannot be taken as evidence. (6) No separate inventory of vouchers is requisite. (7) Payments unvouched, or without the proper stamp, must be disallowed. (8) Vouchers are returned after the audit is completed.

8. [*Backing accounts.*—The back of the account lodged should bear—(1) The name of the factor and ward. (2) The exact period embraced by the account. (3) At the bottom, the reference number of the appointment. The factor, or agent (if the account be attended to by an agent) is requested,

in all cases, to give his precise address, in order to secure the safe transmission of documents.

9. [*Lodging the accounts.*—The annual account, with its appendices,—that is, all that has to be retained and preserved when lodged at the accountant's office—should be stitched together as one paper, and thus be so complete as to be adequate clearly to inform any one having occasion to examine it without the vouchers, when neither the factor nor the accountant can be present to explain.

## II. RENTAL.

10. [*Rentals.*—A rental should never be omitted from the appendix to the account. In ordinary cases, the columns requisite are—(1) Names of possessions. (2) Names of tenants. (3) Arrears taken (without any alteration) from last rental. (4) Rents since become due. (5) Amounts paid. (6) Arrears exact as on the date on which the account closes.

Each subject in the rental must be accounted for annually. If any subject, therefore, has been unoccupied, or taken possession of by a creditor, the circumstance must be so explained. The amounts of columns No. 3 and No. 4 of the rental are carried to the factor's account, charge side, branch 1 and 2 respectively. Where the rental differs from that of the preceding year, the cause of difference should be shown.

## III. AUDIT.

11. [*Commission.*—If none is desired, say so at the end of the account. If desired, mention the amount deemed due, and how arrived at; but do not include it in the account, or take credit for it. The amount fixed by the accountant will come into the next annual account.

12. [*Interest.*—(1) Progressive interest states to be furnished, as an appendix, when interest is either charged or allowed on the account. (2) Bank interest will only be allowed a factor on cash advanced by him, if he had at his command an available factorial fund. (3) The rate of interest, and the period to which it applies and comes down, must always be stated. (4) Interest on a bank or other account-current is not necessarily, and in general should not be, brought down to the closing date of the factor's account. It is enough to state the date from which it is resting, or has yet to be accounted for. Factors will be charged at the rate of twenty per cent. penal interest on the balance exceeding £25 remaining in their hands for more than ten days. See Act of Sederunt, 14th January, 1881, § 11.

13. [*Investments.*—The accountant is required by the Act to "consider the investments." Besides production of the evidence of an investment, therefore, factors should, in the narrative of such an entry, briefly describe the security, its nature, position, and conditions, either in the account or separate vidimus, and produce the valuations on which the money has been



advanced. The Court will not approve of investments in shares, personal bonds, or bills, or even of the protracted continuance of such investments so found by the factor on his appointment, or of the continuance of the funds in trade or business, but will approve of investments on debenture bonds or mortgages of the leading railways in Scotland, duly authorised by Act of Parliament to borrow money on bond or mortgage as may for at least three years previous to each investment have been paying an annual dividend to their ordinary shareholders of not less than two per cent. Investments will also be approved of on unexceptionable bonds or mortgages of corporations or public trusts in Scotland duly authorised by Act of Parliament to borrow money on bond or mortgage, and to levy by assessment rates for payment of the annual interest on such bonds or mortgages. Factors must, however, observe that the responsibility of investment will rest with themselves, and that in each case full evidence must be submitted to the accountant to enable him to judge of the validity and sufficiency of the security, and that it will be competent to him or to the Court to object to any bond or mortgage if the security appears to be in any respect objectionable.

14. [*Report.*]—When lodged, the account will be audited without delay, and a draft report issued, and this the factor is requested without delay to revise and return, and in any event within twenty days. The factor should endeavour to clear up all difficulties in his annual account, and to embody there all that he wishes to record for his future exoneration at the accountant's office. Fragmentary and miscellaneous papers lodged—as they often are—at other seasons, can rarely be of use either at the time or at a future date. It is only once a-year, in ordinary circumstances, that the position of each estate can be fully gone into and reported on.

15. [*Notes by the accountant.*]—When the accountant issues notes at the annual audit, the factor's additional productions or answers or explanations should be signed by him. Such separate papers or supplementary letters, however, ought not to be requisite. They never can compensate for the neglect to lodge at first accounts in themselves conclusive. The unnecessary expense then or thereafter so created will fall upon the factor, and not upon the estate.

#### IV. SPECIAL POWERS.

16. [*Opinions.*]—The accountant cannot take the responsibility of giving opinions for the guidance of factors, unless in the course of his duty in the annual audit of a factor's account, or to the Court in applications by factors for special powers. In the latter case the factor proceeds in the form of a report to the accountant, he states the circumstances and his own views (as in a petition to the Court), and concludes (as in the prayer of a petition) by stating briefly the exact powers he wishes the Court to grant to him. The accountant's opinion will follow thereon. The factor should

then bring his report with the accountant's opinion by a Note before the Sheriff.

#### V. MISCELLANEOUS.

17. *The death* (with evidence of it) of a factor or ward, or death or insolvency of a cautioner, to be intimated.

18. [*Fees of audit.*—When the draft report has been returned to the accountant, and the audit is completed, the amount due to the fee-fund will immediately be intimated to the factor, and, when paid (unless in special circumstances), the whole vouchers forthwith returned. Further communications with the accountant should not be ordinarily requisite until the occurrence of the audit of the year following.

#### VI. PETITIONS FOR DISCHARGE.

In order to facilitate these applications, and to prevent unnecessary trouble and expense to estates, the accountant of the Court of Session begs to call the attention of agents to the following requisites which have now been sanctioned by the practice of years :—

##### I. FACTORS LOCO TUTORIS—TUTORS-AT-LAW—TUTORS-DATIVE.

Where the factor or tutor applies for discharge at the termination of his office—i.e., when the youngest pupil reaches minority—he requires to produce—

- (1.) Evidence of the age of the youngest of the pupils.
- (2.) Evidence that the minors have chosen curators—i.e., the extract decree of curatory.
- (3.) A discharge by the minors, with consent of their curators, acknowledging that the funds and effects under the factory have been paid over to or accounted for to them. The discharge should refer in special terms to the funds and effects as at the termination of the office, reported on by the accountant. A convenient form is to append a state of these funds to the discharge, referring to it in the latter, and holding it as therein repeated.

##### II. CURATORS BONIS—CURATORS-AT-LAW—JUDICIAL FACTORS TO LUNATICS.

1. Where the ward dies testate, the curator requires to produce—
  - (1.) The deceased's will or trust-settlement, or an extract.
  - (2.) Confirmation by the trustees and executors acting under it.
  - (3.) A discharge by them to the effect above described.
2. [*Where the ward dies intestate.*]
  - (1.) Production of confirmation by the executor-dative.
  - (2.) A discharge by him to the effect above described.

3. [*Where the ward recovers.*].—The curator should present a petition for recall, producing therewith medical certificates of the ward's recovery. After the curatory is recalled, the ward may execute a valid discharge in the terms before mentioned.

III. RECALL AND DISCHARGE DURING THE SUBSISTENCE OF THE OFFICE,  
OR ON THE DEATH OF FACTOR.

1. It will be seen from the preceding notes that the factor requires to divest of the estate, and transfer the funds, documents of debt, and other writs, to the party or parties entitled to receive and discharge the same, before he can be judicially discharged.

2. It follows, also, that where a subsisting factory is sought to be terminated by the factor desiring to resign the office, on account of leaving the country, or any other proper cause, he cannot be discharged until some one has been appointed in his room, in whose favour he can divest ; unless consignation is ordered by the Court.

3. Where the factor dies, a new factor will be appointed, to whom the representatives of the deceased factor will fall to account.

4. It is competent to embrace the application for recall and discharge, and for a new appointment, in one petition.

5. [*Procedure.*].—In all cases the accountant will issue a draft of his proposed report to the Court for revival. It is extremely desirable, therefore, that the case should be in all respects complete before the draft report is prepared. When the report is signed, it will be forwarded to the agent, that it may be laid before the Sheriff. When judicial discharge is obtained, the agent will procure an extract, and on exhibiting it to the accountant he will obtain delivery of the bond of caution. The case will then be written off the accountant's register.

OFFICE OF ACCOUNTANT OF COURT,  
GENERAL REGISTER HOUSE, EDINBURGH.

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FORM OF ACCOUNT.

In order to afford assistance to those factors who have not been used to the preparation of Accounts of Charge and Discharge, the following Form has been prepared. The example is purposely of the most simple character, and though the entries are too briefly expressed, it illustrates the entire principle on which such an account should be stated. It assumes the pre-existence of a correct cash-book and rental kept by the factor. The factor must not mix any of these branches, and especially separate and minutely distinguish revenue from capital. And all vouchers must be lodged at once, and with the account. Factors should be careful not to retain a sum of £25 or

upwards in their hands at any time for a period exceeding ten days, as they render themselves liable in a penalty of 20 per cent. See Act, § 5 of 12 & 13 Vict. cap. 51; and § 11 of Act of Sederunt, 14th January, 1881.

### EXAMPLE.

No. 1165.—ACCOUNT of CHARGE and DISCHARGE of the INTROMISSIONS of , residing at , as *Curator Bonis* (or as the case may be) to , presently residing at , from 31st March, 1856, to 31st March, 1857.

The Cautioner is , residing at .

### I. CHARGE.

#### I. ESTATE AS TAKEN CREDIT FOR AT THE CLOSE OF LAST ACCOUNT.

|   |       |       |      |
|---|-------|-------|------|
| 1. Heritable bond by <i>A B</i> over lands of , | £1000 | 0     | 0    |
| 2. Balance in Royal Bank, . . . . .             | 1115  | 10    | 6    |
| 3. Household furniture as appraised, . . . . .  | 200   | 0     | 0    |
| 4. Balance in factor's hand, . . . . .          | 25    | 0     | 0    |
|   | <hr/> |       |      |
|   | Sum,  | £2340 | 10 6 |

#### II. REVENUE.

##### 1. Rents.

|   |       |    |   |
|---|-------|----|---|
| (1.) Arrears of rents as taken credit for at the close of last account, . . . . . | £15   | 10 | 0 |
| (2.) Current rents, as per rental in appendix to this account, . . . . .          | 74    | 0  | 0 |
|   | <hr/> |    |   |
|   | £89   | 10 | 0 |

NOTE.—A Form of Rental furnished to factors when desired by them.

##### 2. Interests.

|   |       |   |   |
|---|-------|---|---|
| (1.) Heritable bond for £1000 granted by <i>A B</i> over lands of , |       |   |   |
| 1856, 15th May. Interest at 5 per cent.                             |       |   |   |
| for half-year to this date, £25                                     | 0     | 0 |   |
| „ Nov. 11. Do. do. 25   | 0     | 0 |   |
|   | <hr/> |   |   |
|   | £50   | 0 | 0 |

|   |    |   |   |
|---|----|---|---|
| (2.) Heritable bond for £500 granted by <i>CD</i> over lands of ; |    |   |   |
| 1856, 11th Nov. Interest for half-year to this date,              |    |   |   |
| at 4 per cent, . . . . .  | 10 | 0 | 0 |

|                |     |   |   |     |    |   |       |    |   |
|----------------|-----|---|---|-----|----|---|-------|----|---|
| Carry forward, | £60 | 0 | 0 | £89 | 10 | 0 | £2340 | 10 | 6 |
|----------------|-----|---|---|-----|----|---|-------|----|---|

|                          |         |          |            |
|--------------------------|---------|----------|------------|
| Brought forward, .       | £60 0 0 | £89 10 0 | £2340 10 6 |
| (3.) Bank Account.       |         |          |            |
| 1856, 31st Dec. Interest |         |          |            |
| added by Royal Bank to   |         |          |            |
| 31st December, 1856, .   | 34 17 6 |          |            |
|                          | <hr/>   | 94 17 6  |            |

3. *Annuity.*

|                           |         |        |         |
|---------------------------|---------|--------|---------|
| 1856, 15th July. Received |         |        |         |
| half-year's annuity due   |         |        |         |
| at this date, . . . .     | £25 0 0 |        |         |
| 1857, 15th Jan. Do. do.,  | 25 0 0  |        |         |
|                           | <hr/>   | 50 0 0 |         |
|                           | Sum,    | <hr/>  | 234 7 6 |

## III. CAPITAL REALISED.

|                                  |                |       |            |
|----------------------------------|----------------|-------|------------|
| 1856, 15th May. Drawn from Bank, | £500 0 0       |       |            |
|                                  | <hr/>          |       |            |
|                                  | Sum of Charge, | <hr/> | £2574 18 0 |

NOTE.—As the factor debits himself with the whole estate at the commencement of the account, and takes credit, at the termination of the discharge, for the whole estate as then subsisting, the realisation of capital, as above, though noticed thus in an inner column, is not carried into the outer or money column. This £500, with which the factor is already debited by the balance in bank in branch 1 of the charge above, will be found taken credit for as invested under branch 5 of discharge.

## II. DISCHARGE.

## I. BURDENS AND REPAIRS.

1. *Burdens.*

|  | Voucher<br>No. |         |
|--|----------------|---------|
| 1856, 25th May. Police assessment on property in | 1.             | £2 7 6  |
| „ 31st „ Fire insurance on do.                   | 2.             | 1 9 0   |
| „ 19th June. Poor's assessment on do.            | 3.             | 2 10 0  |
| „ „ Property-tax on do.                          | 4.             | 1 5 0   |
|  |                | <hr/>   |
|  |                | £7 11 6 |

2. *Repairs.*

|   |        |       |         |
|---|--------|-------|---------|
| 1856, 25th July. Paid James Brown for mason work, |        |       |         |
| per estimate, . . . .                             | £5 7 0 | 5.    |         |
| „ 19th Oct. Paid Henry Smith for                  |        |       |         |
| papering house                                    | 3 9 0  | 6.    |         |
|   | <hr/>  |       | 8 16 0  |
|   | Sum,   | <hr/> | £16 7 6 |
| Carry forward, . . . .                            |        |       | £16 7 6 |

|  |                                       |   |    |                  |     |    |           |
|--|---------------------------------------|---|----|------------------|-----|----|-----------|
|  |                                       |   |    | Brought forward, | £16 | 7  | 6         |
| <b>II. MAINTENANCE OF WARD.</b>  |                                       |   |    |                  |     |    |           |
| 1856, 15th April.  | Quarter's board in                    | Asylum                                      |    |                  |     |    |           |
|  | to this date,                         | £15   | 0  | 0                | 7.  |    |           |
| „ 15th July.   | Do. do. do.,                          | 15  | 0  | 0                | 8.  |    |           |
| „ 15th Oct.  | Do. do. do.,                          | 15  | 0  | 0                | 9.  |    |           |
| 1857, 15th Jan.  | Do. do. do.,                          | 15  | 0  | 0                | 10. |    |           |
|  |                                       |   |    | £60              | 0   | 0  |           |
| „  | „                                     | Clothes, &c., furnished                     |    |                  |     |    |           |
|  | ward during year,                     | 12  | 14 | 0                | 11. |    |           |
|  |                                       |   |    |                  |     | 72 | 14 0      |
| <b>III. CAPITAL INVESTED.</b>  |                                       |   |    |                  |     |    |           |
| 1856, 15th May.  | Loan to <i>C D</i> over               |   |    |                  |     |    |           |
|  | lands of                              | £500  | 0  | 0                |     |    |           |
| 1857, 31st March.  | Paid into Royal Bank                  |   |    |                  |     |    |           |
|  | during year,                          | 95  | 13 | 0                |     |    |           |
|  |                                       |   |    | £595             | 13  | 0  |           |
| See Note, Branch 3 of Charge.  |                                       |   |    |                  |     |    |           |
| <b>IV. MANAGEMENT.</b>   |                                       |   |    |                  |     |    |           |
| <b>1. Law Expenses.</b>  |                                       |   |    |                  |     |    |           |
| 1856, 31st Dec.  | Paid                                  | his account for appoint-                    |    |                  |     |    |           |
|  |                                       | ment of <i>curator bonis</i> in the present |    |                  |     |    |           |
|  | case,                                 | £20   | 13 | 6                | 12. |    |           |
| NOTE.—Business accounts should be paid in full, or in part, subject to taxation by the auditor of Court. |                                       |   |    |                  |     |    |           |
| <b>2. Commission to Factor.</b>  |                                       |   |    |                  |     |    |           |
|  | Amount allowed by accountant of Court |   |    |                  |     |    |           |
|  | at last audit,                        | 5   | 5  | 0                | 13. |    |           |
| <b>3. Miscellaneous.</b>   |                                       |   |    |                  |     |    |           |
| 1856, 15th June.   | Paid travelling                       |   |    |                  |     |    |           |
|  | expenses with                         |   |    |                  |     |    |           |
|  | ward to asy-                          |   |    |                  |     |    |           |
|  | lum,                                  | £1  | 3  | 0                | 14. |    |           |
| „ 18th July.   | Paid accountant's                     |   |    |                  |     |    |           |
|  | fees of audit of                      |   |    |                  |     |    |           |
|  | last account,                         | 0   | 10 | 6                | 15. |    |           |
|  |                                       |   |    | 1                | 13  | 6  |           |
|  |                                       |   |    |                  |     | 27 | 12 0      |
| <b>V. ESTATE AS AT CLOSE OF THIS ACCOUNT.</b>  |                                       |   |    |                  |     |    |           |
| <b>1. Heritable bond by <i>A B</i> over lands</b>  |                                       |   |    |                  |     |    |           |
|  | of                                    | £1000                                       | 0  | 0                |     |    |           |
| Carry forward,   |                                       |   |    | £1000            | 0   | 0  | £116 13 6 |

|  |       |    |   |       |    |   |
|--|-------|----|---|-------|----|---|
| Brought forward, . . . . .   | £1000 | 0  | 0 | £116  | 13 | 6 |
| 2. Heritable bond by <i>C D</i> over lands<br>of . . . . .   | 500   | 0  | 0 |       |    |   |
| 3. Balance in Royal Bank, including<br>interest to 31st December, 1856,<br>as per certified bank pass-book<br>(or as the case may be), . . . . . | 746   | 1  | 0 |       |    |   |
| 4. Household furniture as appraised, . . . . .   | 200   | 0  | 0 |       |    |   |
| 5. Arrears of rent outstanding as per<br>rental, . . . . .   | 7     | 10 | 0 |       |    |   |
|  | <hr/> |    |   | £2453 | 11 | 0 |
| Add—   |       |    |   |       |    |   |
| 6. Balance in hands of factor, . . . . .   | 4     | 13 | 6 |       |    |   |
|  | <hr/> |    |   | 2458  | 4  | 6 |
| Sum of Discharge, equal to the Charge, . . . . .   |       |    |   | <hr/> |    |   |
|  |       |    |   | £2574 | 18 | 0 |

*Signature of the Factor, A B.*

[*Date.*]

NOTE.—It is the special interest of each factor thus to record, once a-year, by one state of accounts (which is carefully preserved in the accountant's office), a full and clear view of his management. This will avert the need of all other loose papers or correspondence, and the questions likely to arise from complicated corrections and explanations.

## FORM OF RENTAL.

RENTAL OF PROPERTIES BELONGING TO \_\_\_\_\_, FOR THE YEAR  
ENDING 31st MARCH, 1857.

NOTE.—(1.) The columns should be summed, and numbers 3 and 4 added together, and also 5 and 6, which should agree in amount.

(2.) Lands and tenements unoccupied, or in possession of a bondholder, or natural possession of the proprietor, to be included and the rents stated, though not carried into the money column.

| OCCUPANCIES.          | NAMES<br>OF<br>TENANTS. | Arrears of<br>Rent at close<br>of last<br>Account. | Current Year's<br>Rental. | Whereof re-<br>ceived by Factor<br>of Columns 3<br>and 4 | Remains in<br>Arrear at close of<br>this Account. | Remarks in<br>explanation of<br>lowering of Rents,<br>Arrears, &c. |
|-----------------------|-------------------------|--|---------------------------|--|---|--|
| 1                     | 2                       | 3  | 4                         | 5  | 6   |  |
|                       |                         | £ s. d.  | £ s. d.                   | £ s. d.  | £ s. d.   |  |
| No. 5 George Street,  | James Johnston,         | ..   | 14 10 0                   | 14 10 0  | ..  |  |
| No. 6 Do.             | Mrs. Baxter, . .        | ..   | 14 10 0                   | 7 0 0  | 7 10 0  |  |
| No. 14 Wellington Pl. | Wm. Henderson,          | 10 0 0   | 20 0 0                    | 20 0 0   | ..  |  |
| No. 15 Do.            | John Simpson, .         | ..   | 12 10 0                   | 12 10 0  | ..  |  |
| No. 16 Do.            | George Smith, .         | 5 10 0   | 12 10 0                   | 18 0 0   | ..  |  |
|                       |                         | 15 10 0  | 74 0 0                    | 82 0 0   | 7 10 0  |  |
|                       |                         |  | 15 10 0                   |  | 82 0 0  |  |
|                       |                         | Charge,  | 89 10 0                   | Dis-<br>charge,  | 89 10 0   |  |

[Signature.]

## CHAPTER V.—RELIEF OF THE POOR.

8 & 9 Vict. c. 83.—An ACT for the Amendment and better Administration of the Laws relating to the Relief of the Poor in *Scotland*.—4th August, 1845.

73. [*Party refused [relief] may apply to Sheriff.*—And be it enacted, That if relief shall be refused to any poor person who shall have made application for relief, it shall and may be lawful for such poor person to



apply to the Sheriff of the county in which the parish or combination from which such poor person has claimed relief, or any portion of such parish or combination, is situate, and the said Sheriff shall forthwith, if he be of opinion that such poor person is, upon the facts stated, legally entitled to relief, make an order upon the inspector of the poor, or other officer of such parish or combination, directing him to afford relief to such poor person in the meantime until such inspector or other officer shall, on or before a day to be appointed by the said Sheriff, and to be intimated in the same order, give in a statement in writing showing the reasons why the application of such poor person for relief was refused, which statement the said Sheriff shall afterwards appoint to be answered, and shall, if required, nominate an agent to appear and answer on behalf of such poor person, and shall further, if necessary, direct a record to be made up, and a proof to be led by both parties; and it shall be lawful for the Sheriff, if he shall see fit, to direct the interim support to such poor person to be continued until a final judgment shall have been pronounced on the merits of the case: Provided always, that nothing herein contained shall be construed to enable the said Sheriff to determine on the adequacy of the relief which may be afforded, or to interfere in respect of the amount of relief to be given in any individual case.

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**ACT OF SEDERUNT for regulating Procedure before the  
Sheriff Courts, in applications under the Statute 8 & 9 Vict.  
c. 83, § 73.—Edinburgh, 12th February, 1846.**

WHEREAS it is proper that proceedings before the Sheriffs under the statute 8 & 9 Vict. c. 83, intituled "An Act for the Amendment of the Laws relating to the Relief of the Poor in Scotland," should be summary and uniform,—

The Lords of Council and Session do hereby enact and declare :—

1. That where relief has been refused by any parish or combination, to any poor person who shall have made application for relief, such poor person may apply to the Sheriff of the county without the intervention of an agent, and either verbally or in writing.

2. That the Sheriff shall forthwith proceed to consider the facts stated by such poor person; and if he be of opinion, upon the facts so stated, that such poor person is not legally entitled to relief, he shall at once pronounce a deliverance to that effect.

3. That if, on the contrary, the said

Sheriff shall be of opinion, upon the facts so stated, that such poor person is legally entitled to relief, then he shall forthwith make an order upon the inspector of the poor, or other officer of the parish or combination, directing him to afford relief to such poor person in the meantime, until such inspector or other officer shall, on or before a day to be appointed by the Sheriff in the same order, and to be intimated, lodge with the Sheriff-Clerk a statement, in writing, showing the reasons why the application of such poor person for relief was refused.

4. That it shall be sufficient intimation of such order to the said inspector or other officer, that a certified copy thereof be transmitted to him through the post-office marked on the back with the words "Sheriff's-Office—Poor-Law Intimation—Immediate." And it shall be the duty of the Sheriff-Clerk to make such intimation. And the Sheriff-Clerk shall preserve the principal order by the Sheriff, and likewise enter in the minute-book of Court the date of transmitting the copy thereof as aforesaid.

5. That if, after such intimation, the inspector or other said officer, shall not, within the time appointed by the Sheriff, lodge a statement in writing, in terms of the Sheriff's order, the Sheriff shall forthwith, upon a certificate by the Sheriff-Clerk that a copy of such order was duly transmitted as aforesaid, pronounce a deliverance or judgment, definitively finding such poor person to be legally entitled to relief, and ordaining the parish or combination instantly to proceed and determine the question of amount.

6. That where, on the other hand, the inspector or other said officer, shall duly lodge his statement in writing, in terms of the Sheriff's order, the Sheriff shall appoint the same to be answered; and he shall, if required, nominate an agent to appear and answer on behalf of such poor person; and shall further, if necessary, direct a record to be made up, and a proof to be led, by both parties; after which he shall proceed to pronounce judgment in the cause, finding substantively such poor person to be legally either *entitled* or *not entitled* to relief; and, in the former case, ordaining the parish or combination, as before, instantly to proceed and determine the question of amount.

7. That so long as the cause shall be in dependence before the Sheriff, and after the said inspector or other officer shall have given in his statement in writing as aforesaid, it shall be lawful for the Sheriff to resume at any time the question of interim support; and

(if he shall see fit) to direct such interim support to be continued until a final judgment shall have been pronounced on the merits of the case; And it shall, on the other hand, be lawful for the Sheriff (if he see fit), after the said inspector or other officer shall have given in his statement in writing to direct such interim support to be at any time discontinued,—as well as thereafter at any time to ordain the same to be of new afforded, as he may see cause.

8. Finally, that the said causes, so far as such poor person applying to the Sheriff is concerned, shall, in all respects, be conducted on the same footing,—in regard to payment, in the first instance, of any dues of Court, or other fees,—as if such poor person had been admitted to the benefit of the poor's roll; that is to say, such poor person shall not, in the first instance, be liable in payment either of any dues of Court, or of any dues to the clerk or officer of Court, or of fees to any agent who may have been appointed to act in his behalf as aforesaid, except to the extent of actual outlay; but in the event of such poor person being ultimately found entitled to expenses of process, it shall be competent to such poor person to include and charge in his account of said expenses as against the parish or combination, all ordinary fees of Court, including clerk's dues and dues of extract, as well as fees, at the usual rate of charge, to his agent, and any officers of Court, in like manner as if he had been an ordinary litigant; and on the said expenses being recovered, the amount thereof shall be accounted for by such poor person or his agent, to the several parties interested. And further, in the event of such poor persons being ultimately subjected by the Sheriff's judgment in expenses to the parish or combination, the expenses so awarded shall be held to include all the usual fees and dues payable, and which have been paid, by the said parish or combination in the character of an ordinary litigant.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be printed and published in common form.

D. BOYLE, I.P.D.

## CHAPTER VI.—REMOVINGS AND SEQUESTRATIONS.

## ACT OF SEDERUNT anent Removings.—14th Dec., 1756.

WHEREAS the difficulties that have occurred in actions of removing from lands have been found to be highly prejudicial to agriculture, and both to masters and tenants, in respect that, during the dependence of such actions, the lands are neglected and deteriorated by the defender, and the heritor's security for his rent brought into danger; and tenants are discouraged from entering into tacks, by the uncertainty of their attaining to possession, and by their finding the subject of their tack much deteriorated during the dependence of the process of removing against the preceding tenant; The Lords of Council and Session, resolving to remedy this great evil, do make the following regulations, viz. :— . . .

4. Where a tenant hath irritated his tack by suffering two years' rent to be in arrear, it shall be lawful to the setter or heritor to declare the irritancy before the Judge Ordinary, and to insist in a summary removing before him: And it shall be lawful to the Sheriff or Steward-

Depute, or their Substitutes, to find the irritancy incurred, and to decern in the removing, any practice to the contrary notwithstanding.

5. Where a tenant shall run in arrear of one full year's rent, or shall desert his possession, and leave it unlaboured at the usual time of labouring, in these, or either of these cases, it shall be lawful to the heritor, or other setter of the lands, to bring his action against the tenant before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for payment of the rent for the five crops following, or during the currency of the tack, if the tack is of shorter endurance than five years, within a certain time to be limited by the judge; and, failing thereof, to decern the tenant summarily to remove, and to eject him in the same manner as if the tack were determined, and the tenant had been legally warned in the terms of the foressaid Act, 1555.

### 43 Vict. c. 12.—An ACT to abolish the Landlord's Right of Hypothec for Rent in Scotland.—24th March, 1880.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Landlord's hypothec to cease after 11th November, 1881.*].—From and after the eleventh day of November, one thousand eight hundred and eighty-one, hereinafter called the commencement of this Act, the landlord's right of hypothec for the rent of land, including the rent of any buildings thereon, exceeding two acres in extent, let for agriculture or pasture, shall cease and determine: Provided that nothing herein contained shall apply to any claim for rent due, or which may hereafter become due, under any lease, writing, or bargain current at the date of the commencement of this Act,

2. [*Landlord's remedies when rent is due and unpaid.*].—From and after the commencement of this Act the landlord of any land exceeding two acres in extent, and let for agriculture or pasture, shall, subject to the provisions of the preceding section of this Act, have the same rights and remedies against his tenant when six months' rent is due and unpaid as is now provided by the law of Scotland when twelve months' rent is due and unpaid, and shall also have the same rights and remedies against his tenant when twelve months' rent is due and unpaid as is now provided by the law of Scotland when two years' rent is due and unpaid, but subject always to the following provision; (that is to say)—It shall not be lawful for the Sheriff or Sheriff-Substitute to entertain any action for caution and removing, or for irritancy and removing, unless such action has been preceded by fourteen days' written notice by registered post-office letter or otherwise to the tenant that such action is intended; nor in an action for caution and removing, to decern the tenant to find caution for more than the arrears of rent and one year's rent further.

Provided also, that in the event of the removal or ejection of a tenant from such land in any year under the provisions of the Act of Sederunt anent Removings, of the fourteenth day of December, one thousand seven hundred and fifty-six, and of this Act, on account of being in arrear of rent for six months or twelve months, as the case may be, the following further provisions shall have effect:

- (1.) A tenant so removed or ejected shall not thereby forfeit the rights of an outgoing tenant, to which he would have been entitled if his lease had naturally expired at the date of removing or ejection, or at the last preceding term of Whitsunday or Martinmas, in the event of the removing or ejection taking place between these terms:
- (2.) When the removing or ejection takes place between the before-mentioned terms the tenant shall be entitled to payment of or credit for the expenditure made by such tenant since the last preceding term on the labour, seed, and manure applied to any crop, other than an away-going crop, falling within the immediately preceding provision:
- (3.) Where a tenant is removed or is ejected between the before-mentioned terms, he shall not, except as hereinafter provided, be liable to pay for the occupation of such land after the immediately preceding term of Whitsunday or Martinmas more than a proportion of the rent effeiring to the period between such term and the date of removing or ejection: Provided always, unless otherwise expressly stipulated, that where any away-going crop to which a tenant is entitled is immature at the date of such removing or ejection, neither the tenant nor any one deriving right through him shall be entitled to carry away such crop at maturity until payment shall have been made to the landlord of the proportion of rent

effeiring to the land under such crop for the period between the date of removing or ejection, and the next term of Martinmas, the rent of such land being estimated according to the average rent of the whole land from which the tenant has been so removed or ejected.

3. [*Provisions of § 2 not to apply in addition to hypothec.*—The provisions of the second section of this Act shall not apply in any case in which the landlord's right of hypothec has not ceased and determined.

4. [*Short title.*—This Act may be cited as the Hypothec Abolition (Scotland) Act, 1880.

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46 & 47 Vict. c. 62.—An ACT for Amending the Law relating to Agricultural Holdings in Scotland.—25th August, 1883.

SECT. 27. *Removing for Nonpayment of Rent.*

27. [*Tenants to be removed only at legal terms.* 43 Vict. c. 12.]—In any case in which the landlord's right of hypothec for the rent has ceased and determined—

When six months' rent of the holding is due and unpaid, it shall be lawful for the landlord to raise an action of removing before the Sheriff against the tenant, concluding for his removal from the holding at the term of Whitsunday or Martinmas next ensuing after the action is brought, and unless the arrears of rent then due are paid, or caution is found to the satisfaction of the Sheriff for the same, and for one year's rent further, the Sheriff may decern the tenant to remove, and eject him at such term in the same manner as if the lease were determined, and the tenant had been legally warned to remove.

A tenant so removed shall have the rights of an outgoing tenant to which he would have been entitled if his lease had naturally expired at such term of Whitsunday or Martinmas.

The second and third sections of the Hypothec Abolition (Scotland) Act, 1880, are hereby repealed, and the provisions of the fifth section of the Act of Sederunt anent Removing, of the fourteenth day of December one thousand seven hundred and fifty-six, shall not apply in any case in which the procedure under this section is competent.

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### PART III.

### SMALL DEBT COURT.

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1 *Vict. c. 41.*—An Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt Causes by the Sheriffs in *Scotland*.—12th July, 1837.

WHEREAS an Act was made in the tenth year of the reign of his Majesty King George the Fourth, intituled *An Act for the more effectual Recovery of Small Debts, and for diminishing the expenses of Litigation in causes of small amount in the Sheriff Courts in Scotland* (10 Geo. IV. c. 55), the provisions of which have been found beneficial, but experience has pointed out certain alterations by which its benefits will be extended and rendered more effectual ; and it is expedient that such alterations and the former provisions should be consolidated in one Act : Be it therefore enacted :

[*Recited Act repealed, except as to causes commenced.*].—That the said recited Act shall be and the same is hereby repealed from and after the first day of *October* next, save and except as to such causes as shall have been commenced under the authority of the said recited Act before the said first day of *October* next, and shall be then depending, all which causes shall be carried to a conclusion according to the rules prescribed by the said Act, notwithstanding this Act ; and this Act shall commence and take effect from and after the said first day of *October* next.

2. [*Sheriffs may hear and determine in a summary way causes for sums under £8, 6s. 8d. sterling.*].—And be it enacted, That it shall be lawful for any Sheriff in *Scotland* within his county to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all civil causes and all prosecutions for statutory penalties, as well as all maritime civil causes and proceedings, that may be competently brought before him, wherein the debt, demand, or penalty in question shall not exceed the value of eight pounds six shillings and eight pence sterling,\*

\* This Act is to be read and construed as if the words "twelve pounds" were substituted for the words "eight

pounds six shillings and eightpence" wherever the latter words occur. (16 & 17 *Vict. c. 80, § 26, supra, p. 647.*)

exclusive of expenses and fees of extract: Provided always, that the pursuer or prosecutor shall in all cases be held to have passed from and abandoned any remaining portion of any debt, demand, or penalty beyond the sum actually concluded for in any such cause or prosecution.

3. [*Providing forms of proceedings.*].—And be it enacted, That all such causes and prosecutions which the pursuers or prosecutors thereof shall choose to have heard and determined according to the summary mode hereby provided, shall proceed, except as hereinafter provided, upon summons or complaint, agreeably to the form in Schedule (A) annexed to this Act, and containing warrant to arrest upon the depending action, stating shortly the origin of debt or ground of action, and concluding against the defender; which summons or complaint, being signed by the Sheriff-Clerk, shall be a sufficient warrant and authority to any Sheriff's-officer for summoning the defender to appear and answer at the time and place mentioned in such summons and complaint, not being sooner than upon the sixth day after such citation, and the same, or the copy thereof, served on the defender, shall also be a sufficient warrant for summoning such witnesses and havers as either party shall require; and a copy of the said summons or complaint, with the citation annexed, and also a copy of the account, if any, shall be served at the same time by the Sheriff's-officer on the defender personally or at his dwelling-place, or in case of a company at their ordinary place of business; and the officer summoning parties, witnesses, or havers shall in all cases under this Act return an execution of citation, signed by him, or shall appear and give evidence on oath of such citation having been duly made; and all such citations given by an officer alone without witnesses, and executions thereof subscribed by such officer, shall be good and effectual to all intents and purposes.

4. [*Causes of higher value than £8, 6s. 8d. reduced to £8, 6s. 8d. may be remitted to the Small Debt Roll.*].—And be it enacted, That in any cause before the Sheriff's ordinary Court in which the debt, demand, or penalty in question shall not exceed the value of eight pounds six shillings and eightpence sterling, or shall have exceeded the value of eight pounds six shillings and eightpence sterling, but from interim decree or otherwise the value shall, previous to the closing of the record, be reduced so as not to exceed eight pounds six shillings and eightpence sterling, exclusive of expenses and fees of extract, it shall be competent to the Sheriff, if he shall think proper, and with the consent of the pursuer, to remit such cause to such of his Small Debt Court Rolls as may be proper, either of his own motion or upon the motion of any party in the cause: Provided that if the pursuer shall not consent, the provisions of this Act as to the fees or expenses to be allowed in causes below the value of eight pounds six shillings and eightpence brought not according to the summary form herein provided, shall be applied to such causes subsequent to the proposition for remit, if the Sheriff shall think proper to so modify the expenses: Provided

also, that when a case has been remitted by the Sheriff-Substitute from the Ordinary Court to the Small Debt Court, an appeal shall be competent to the Sheriff against such remit, but no reclaiming petition shall be allowed against such remit.

5. [*Recovery of rents not exceeding £8, 6s. 8d.*].—And be it enacted, That it shall be competent for the Sheriff in the Small Debt Courts established or to be established under this Act, to hear, try, and determine, in the summary form herein provided, applications by landlords or others having right to the rents and hypothec for sequestration and sale of a tenant's effects for recovery of rent, provided the rent or balance of rent claimed shall not exceed eight pounds six shillings and eightpence sterling; and the summons and warrant of sequestration and procedure shall be agreeable to the forms directed in Schedule (B) annexed to this Act; and the officer when he executes the warrant, shall get the effects appraised by two persons, who may also be witnesses to the sequestration; and an inventory or list of the effects, with the appraisement, shall be given to or left for the tenant, who shall be cited in manner and to the effect aforesaid; and an execution of the citation and sequestration, with the appraisement of the effects, shall be returned to the clerk within three days; and, on hearing the application in manner provided by this Act relative to other causes, the Sheriff shall dispose of the cause as shall be just, and may either recall the sequestration in whole or in part, or pronounce decree for the rent found due, and grant warrant for the sale of the sequestrated effects on the premises, or at such other place and on such notice as he shall by general or special regulation direct, and failing such directions the sale shall be carried into effect in the manner hereinafter directed for the sale of poinded and sequestrated effects; and if after sequestration the tenant shall pay the rent claimed, with the expenses, to the pursuers, or consign the rent, with two pounds sterling to cover expenses, in the hands of the Clerk of Court, the sequestration shall *ipso facto* be recalled, in case of payment, on the clerk writing and signing on the back of the summons or warrant the words "payment made," which, on evidence being produced to him of payment of the rents claimed, with expenses, he is hereby required to do, and in case of consignment after the clerk shall in like manner have written and signed the words "consignation made," on the same being intimated by an officer of Court to the sequestrating creditor.\*

6. [*Arrestment of goods of defender.*].—And be it enacted, That the pursuer of any civil cause, including maritime civil causes and proceedings, may use arrestment on the dependence of the action of any money, goods, or effects to an amount or extent not exceeding the value of eight pounds six shillings and eightpence sterling, owing or belonging to such defender, in the hands of any third party, either within the county in which such warrant shall have been issued or in any other county or counties: Pro-

\* Extended to sequestrations *currentis termino* (16 & 17 Vict. c. 80, § 28, *supra*, p. 648).



vided always, that before using such warrant in any other county it shall be presented to and indorsed by the Sheriff-Clerk of such other county, who is hereby required to make such indorsement on payment of the fee herein-after mentioned : Provided also, that any arrestment laid on under the authority of this Act shall, on the expiry of three months from the date thereof, cease and determine, without the necessity of a decree or warrant of loosing the same, unless such arrestment shall be renewed by a special warrant or order, duly intimated to the arrestee, in which case it shall subsist and be in force for the like time and under the like conditions as under the original warrant, or unless an action of forthcoming or multiple-poining, in manner hereinafter provided, shall have been raised before the expiry of the said period of three months, in which case the arrestment shall subsist and be in force until the termination of such action of forthcoming or multiple-poining.

7. [*Wages not liable to arrestment.*].—And be it enacted and declared, That wages of labourers and manufacturers shall, so far as necessary for their subsistence, be deemed alimentary, and, in like manner as servants' fees and other alimentary funds, not liable to arrestment.\*

8. [*For providing how arrestments may be loosed.*].—And be it enacted, That when any arrestment shall have been used on the dependence of any action, it shall be competent to the defender to have such arrestment loosed, on lodging with the Sheriff-Clerk of the county in which such arrestment shall have been used a bond or enactment of caution, by one or more good and sufficient cautioners, to the satisfaction of such Sheriff-Clerk, agreeably to the form in Schedule (C) annexed to this Act, or on consigning in the hands of such Sheriff-Clerk the amount of the debt or demand, with five shillings for expenses in cases of actions for sums below five pounds, and

\* 8 & 9 Vict. c. 39.—An Act to amend the Law of Arrestment of Wages in Scotland.—21st July, 1845.

WHEREAS an Act was passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled *An Act to alter and amend an Act passed in the thirty-ninth and fortieth years of King George the Third, for the recovery of Small Debts in Scotland*: and whereas another Act was passed in the first year of the reign of Her present Majesty, intituled *An Act for the more effectual recovery of Small Debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt causes by the Sheriffs in Scotland*: and whereas it is expedient that the said Acts should be amended

as regards the arrestment of wages :

[*Arrestment of wages not competent on dependence of action.*].—Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act it shall not be lawful or competent to arrest wages upon the dependence of any action raised by virtue of the said recited Acts, anything therein contained to the contrary notwithstanding.

2. [*Alteration of Act.*].—And be it enacted that this Act may be amended or repealed by any Act to be passed during the present session of Parliament.

See also 33 & 34 Vict. c. 63, printed *supra*, p. 599.

ten shillings in cases of higher amount, or on producing to such Sheriff-Clerk evidence of the defender having obtained decree of absolvitor in the action, or of his having paid the sums decerned for, or of his having consigned in the hands of the Clerk of the Court in which the action depended the sums decerned for, or the amount of the debt or demand, and expenses as aforesaid, when no decree has yet been pronounced; and a certificate in the form in the said schedule given by the Sheriff-Clerk of the county in which such arrestment shall have been used, of a bond or enactment of caution to the extent of the debt or demand, and expenses, having been lodged with him, or of consignment, as above provided, having been made in his hands, shall operate as a warrant for loosing any arrestment used either in that or in any other county on the dependence of the same action, without any other caution being found or any other consignment being made by the defender.

9. [*Rendering arrestments effectual.*].—And be it enacted, That any person entitled to pursue an action of forthcoming, where the sum or demand sought to be recovered under the forthcoming shall not exceed the value of eight pounds six shillings and eightpence sterling, exclusive of expenses and fees of extract, who shall choose to have the same heard and determined according to the summary mode provided by the Act, shall proceed by summons or complaint, agreeably to the form in Schedule (D) annexed to this Act, concluding for payment of the sum for which arrestment has been used, or for delivery of the goods and effects arrested; which summons or complaint, being signed by the Sheriff-Clerk of the county in which the arrestee resides, shall be a sufficient warrant and authority to any Sheriff's-officer for summoning the arrestee and the common debtor to appear and answer at a Sheriff Court of the county in which the arrestee resides, the same not being sooner than the sixth day after the date of citation, and also for summoning witnesses and havers for all parties; and in the event of the common debtor not residing and not being found within the county in which such action of forthcoming shall be brought, he may be cited by any Sheriff's-officer in any other county on the said warrant, the same being first presented to and endorsed by the Sheriff-Clerk of such other county, who is hereby required to indorse the same on payment of the fee hereinafter mentioned, to appear at a Sheriff Court in the county in which the arrestee resides, the same not being sooner in such case than on the twelfth day after the date of citation: Provided always, that the arrestee and the common debtor shall be cited to appear on the same Court-day, and that a copy of the said summons or complaint, with the citation annexed thereto, shall be duly served by the officer, all in the same manner as hereinbefore provided in other causes and prosecutions under authority of this Act, but always allowing to a party cited to appear in the Sheriff Court of a different county from that in which the citation shall be given double the time required by this Act to be allowed to a party cited to appear in the Sheriff Court of the county within which the citation shall be

given: Provided also, that the pursuer of such action of forthcoming shall not by such action be held to have restricted the amount of the debt due by the common debtor.

10. [*Actions of multiplepoinding.*].—And be it enacted, That where any person shall hold a fund or subject which shall not exceed the value of eight pounds six shillings and eightpence, which shall be claimed by more than one party, under arrestments, or otherwise, it shall be competent to raise a summons of multiplepoinding in the Small-Debt Court established or to be established under this Act, to the jurisdiction of which the holder of the fund or subject shall be amenable, which summons and procedure thereon shall be agreeable to the form in Schedule (E) annexed to this Act, and the claimants and common debtors, and also the holder of the fund or subject, if the process be raised in his name or by any other party interested, shall be cited in manner directed to be followed in actions of forthcoming raised under this Act; and it shall be competent to the Sheriff, when he shall see cause, to order such further intimation or publication of the multiplepoinding as he may think proper, by advertisement in any newspaper or otherwise; but no judgment preferring any party to the fund or subject *in medio* shall be pronounced at the first calling of the cause, or until due intimation has been given, such as may appear satisfactory to the Sheriff, in order that all parties may have an opportunity of lodging their claims on the fund or subject *in medio*, and such claims shall be prepared agreeably to the form in Schedule (E); and the Sheriff shall hear, try, and determine the cause as nearly as may be in the summary form provided by this Act.

11. [*Counter claims.*].—And be it enacted, That where any defender intends to plead any counter account or claim against the debt, demand, or penalty pursued for, the defender shall serve a copy of such counter account or claim by an officer on the pursuer, in the form set forth in Schedule (A) hereunto annexed, or to the like effect, at least one free day before the day of appearance, otherwise the same shall not be heard or allowed to be pleaded, except with the pursuer's consent, but action shall be reserved for the same.

12. [*Compelling attendance of witnesses.*].—And be it enacted, That every officer to whom any warrant as aforesaid for citing witnesses and havers shall be intrusted shall cite such witnesses or havers as any party shall require; and all such warrants shall have the same force and effect in any other county as in the county where they are originally issued, the same being first presented to and endorsed by the Sheriff-Clerk of such other county, who is hereby required to indorse the same on payment of the fee hereinafter mentioned; and if any witness or haver, duly cited on a citation of at least forty-eight hours, shall fail to appear, he shall forfeit and pay a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained; and every such penalty shall be paid to the party citing the witness or haver, and shall be recovered in the same manner as other

penalties under this Act, without prejudice always to letters of second diligence for compelling witnesses and havers to attend, as at present competent; and it shall be competent to the Sheriff of any county where a witness or haver resides who has failed to comply with the citations originally issued to grant letters of second diligence for compelling the attendance of such witnesses or havers, and it shall be no objection to any witness that such witness has appeared without citation or without having been regularly cited.

13. [*Hearing and judgment.*].—And be it enacted, that when the parties shall appear the Sheriff shall hear them *viâ voce*, and examine witnesses or havers upon oath, and may also examine the parties, and may put them or any of them upon oath, in case of oath in supplement being required or of a reference being made, and, if he should see cause, may remit to persons of skill to report, or to any person competent to take and report in writing the evidence of witnesses or havers who may be unable to attend upon special cause shown, and such cause shall in all cases be entered in the book of causes kept by the Sheriff-Clerk, due notice of the examination being given to both parties, and thereupon the Sheriff may pronounce judgment; and the decree, stating the amount of the expenses (if any) found due to any party (which may include personal charges, if the Sheriff think fit), and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in Schedule (A) annexed to this Act, or to the like effect; which decree and warrant, being signed by the clerk, shall be a sufficient authority for instant arrestment, and also for poinding and sale and imprisonment, where competent, after the elapse of ten free days from the date of the decree, if the party against whom it shall have been given was personally present when it was pronounced, but if he was not so present poinding and sale and imprisonment shall only proceed after a charge of ten free days, by serving a copy of the complaint and decree on the party personally or at his dwelling place; and if any decree shall not be enforced by poinding or imprisonment within a year from the date thereof, or from a charge for payment given thereon, such decree shall not be enforced without a new charge duly given as aforesaid.

14. [*Procurators, &c., not to appear or plead, nor pleadings to be reduced to writing, without leave of Court.*].—And be it enacted, That no procurators, solicitors, nor any persons practising the law shall be allowed to appear or plead for any party without leave of the Court upon special cause shown, and such leave and the cause thereof shall in all cases be entered in the book of causes kept by the Sheriff-Clerk; nor shall any of the pleadings be reduced to writing or be entered upon any record, unless with leave of the Court first had and obtained, in consequence of any difficulty in point of law or special circumstances of any particular case: Provided always, that when the Sheriff shall order any such pleadings to

be reduced to writing, every case in which such order shall be made shall thenceforth be conducted according to the ordinary forms and proceedings in civil causes and in prosecutions for statutory penalties, and shall be disposed of in all respects as if this Act had not been passed.

15. [*Parties not appearing or making sufficient excuse to be held confessed.*].—And be it enacted, That any defender who has been duly cited failing to appear personally or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of Court, shall be held confessed, and the other party shall obtain decree against him; and in like manner if the pursuer or prosecutor shall fail to appear personally or by one of his family, or by such person as the Sheriff shall allow, such person not being an officer of Court, the defender shall obtain decree of absolvitor, unless in either case a sufficient excuse for delay shall be stated, on which account, or on account of the absence of witnesses, or any other good reason, it shall at all times be competent for the Sheriff to adjourn any case to the next or any other Court-day, and to ordain the parties and witnesses then to attend.

16. [*Hearing in cases of decree in absence.*].—And be it enacted, That where a decree has been pronounced in absence of a defender it shall be competent for him, upon consigning the expenses decerned for, and the further sum of ten shillings to meet further expenses, in the hands of the clerk, at any time before a charge is given, or in the event of a charge being given before implement of the decree has followed thereon, provided in the latter case the period from the date of the charge does not exceed three months, to obtain from the clerk a warrant signed by him sisting execution till the next Court-day or to any subsequent Court-day to which the same may be adjourned, and containing authority for citing the other party, and witnesses and havers for both parties; and the clerk shall be bound to certify to the Sheriff on the next Court-day every application for hearing and sist granted; and such warrant, being duly served upon the other party personally or at his dwelling place in the manner provided in other cases by this Act, shall be an authority for hearing the cause; and in like manner, where absolvitor has passed in absence of the pursuer or prosecutor, it shall be competent for him, at any time within one calendar month thereafter, upon consigning in the hands of the clerk the sum awarded by the Sheriff in his decree of absolvitor as the expenses for the defender and his witnesses, with the further sum of five shillings to meet further expenses, to obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties, which warrant, being duly served upon the defender in the manner provided in other cases by this Act, shall be an authority for hearing the cause as hereby provided in the case of a hearing at the instance of the defender, the said sum of expenses awarded by the Sheriff, and consigned as aforesaid, being in every case paid over to the other party, unless the contrary shall be specially ordered by the Court; and all such warrants for hearing shall be in force, and may be

served by any Sheriff-officer in any county, without indorsation or other authority than this Act.

17. [*Book of Causes, &c. to be kept.*].—And be it enacted, That the Sheriff-Clerk shall keep a book, wherein shall be entered all causes conducted under the authority of this Act, setting forth the names and designations of the parties, and whether present or absent at the calling of the cause, the nature and amount of the claim and date of giving it in, the mode of citation, the leave and cause of procurators' appearance, the several deliverances or interlocutors, and the final decree, with the date thereof, which book shall be signed each Court-day by the Sheriff; and the said entries by the clerk shall be according to the form in Schedule (F) annexed to this Act, or with such addition as the Sheriff shall appoint; and the Sheriff-Clerk shall also keep a book or books containing a register or registers of all indorsations of decrees and warrants issued in other counties, and of all warrants for arrestment on the dependence, and of all loosings of arrestment, and of all reports of poidings or sequestrations and sales of goods and effects, which registers shall be open and patent at office hours to all concerned, without fee; and the Sheriff-Clerk shall cause a copy of the roll of causes to be tried on each Court-day to be exhibited to the public on a patent part of the Court-house at least one hour before the time of meeting of such Court, and which shall continue there during the time the Court shall be sitting; and the Sheriff-Clerk or an officer of Court shall audibly call the causes in such roll in their order.

18. [*Power to direct payment by instalments.*].—And be it enacted, That the Sheriff may, if he think proper, direct the sum or sums found due to be paid by instalments weekly, monthly, or quarterly, according to the circumstances of the party found liable, and under such conditions or qualifications as he shall think fit to annex.

19. [*Decree may be enforced in any other county.*].—And be it enacted, That any decree obtained under this Act may be enforced where competent against the person or effects of any party in any other county as well as in the county where the decree is issued: Provided always, that such decree or an extract thereof shall be first produced to and endorsed by the Sheriff-Clerk of such other county, who is hereby required to make such endorsement on payment of the fee hereinafter mentioned.

20. [*Appraisement and sale of poided and sequestrated effects.*].—And be it enacted, That the sequestration or poiding and sale shall be carried into effect by the officer in a summary way, by getting the effects sequestrated or poided duly appraised by two persons, who may also be witnesses to the sequestration or poiding, and leaving an inventory or list thereof for the party whose effects are sequestrated or poided, and not sooner than forty-eight hours thereafter carrying such effects to the nearest town or village, or, in case the sequestration or poiding shall take place in a town or village, to the cross or most public place thereof, and selling

the same to the highest bidder by public roup between the hours of eleven forenoon and three afternoon at the cross or such most public place, on previous notice of at least two hours by the crier, but reserving to the Sheriff, by such general regulation or special order in any particular case as he shall think fit, to appoint a different hour or place for the sale or a longer or different kind of notice to be given of the time of selling; and in sequestrations and poundings the overplus of the price, if there shall be any, after payment of the sums decerned for, and the expenses, if expenses are awarded, including what is allowed by this Act for sequestration or pouncing and sale, shall be returned to the owner, or consigned with the Sheriff-Clerk if the owner cannot be found; or if the effects are not sold the same shall be delivered over at the appraised value to the creditor to the amount of the sum decerned for and expenses, if awarded, and the allowances for sequestration or pouncing and sale; and a report of the proceedings in the sequestration or pouncing and sale and proceeds, or of the delivery of the effects, shall in every case be made by the officer to the Sheriff-Clerk within eight days thereafter, agreeably to the form in Schedule (G) annexed to this Act, or to the like effect; and where the Sheriff shall order a sale of goods or effects arrested, the same course of proceeding shall be adopted as is above directed in the case of pouncing and sale; and no officer to whom the enforcement of decrees or warrants in cases falling under this Act may be committed shall be liable to any penalty, fine, or punishment for selling goods or effects under authority of such decrees or warrants by public auction, although such officer may not be licensed as an auctioneer, any thing in any Act or Acts to the contrary notwithstanding; and if any person shall secrete or carry off or intromit with any pointed or sequestrated effects *in fraudem* of the pouncing creditors or of the landlord's hypothec, such person shall be liable to summary punishment by fine or imprisonment, as for contempt of Court, either at the instance of the private party, with or without the concurrence of the procurator-fiscal, or at the instance of the procurator-fiscal, or *ex proprio motu* of the Sheriff, besides being liable otherwise as accords of law.

21. [*One witness sufficient.*].—And be it enacted, That in all charges and arrestment, and executions of charges and arrestments, under this Act, one witness shall be sufficient, any law or practice to the contrary heretofore notwithstanding.

22. [*Action for damages by riot under 3 Geo. IV. c. 33, and for recovery of assessments authorised by 9 Geo. IV. c. 39, may be determined by this Act.*].—And be it enacted, That all actions of damages for compensation for loss or injury by the act or acts of any unlawful, riotous, or tumultuous assembly in *Scotland*, or of any person engaged in or making part thereof, authorised to be brought by an Act passed in the third year of the reign of His Majesty King George the Fourth, where the sum concluded for does not exceed eight pounds six shillings and eightpence sterling, as also all action for the recovery of assessments by virtue of an Act passed in the

ninth year of His said Majesty's reign, intituled *An Act for the preservation of the Salmon Fisheries in Scotland*, may be heard and determined in the summary way provided by this Act, and this notwithstanding the amount of such assessments shall exceed eight pounds six shillings and eightpence sterling.

23. [*Sheriffs to hold Circuit Courts for small debt causes.*].—And whereas by an Act passed in the twentieth year of the reign of His Majesty King *George* the Second, for taking away and abolishing the heritable jurisdictions in *Scotland*, it is provided that Sheriffs may hold itinerant Courts at such times and places within their respective jurisdictions as they shall judge expedient, or as shall be directed or ordered by his Majesty, his heirs and successors; and by the said recited Act of the tenth year of the reign of His Majesty King *George* the Fourth provision is made for the necessary accommodation for holding Courts for the purposes of the said Act which the Sheriff should judge it expedient to hold at other than the usual places for holding the same: And whereas it is expedient to make better provision for holding itinerant or Circuit Courts for the purposes of this Act; be it enacted, that the several Sheriffs of the several sheriffdoms in *Scotland* shall, in addition to their ordinary Small Debt Courts, by themselves or their Substitutes, hold Circuit Courts for the purposes of this Act at such of the places within each sheriffdom set forth in the Schedule (H) annexed to this Act, and for such number of times within each place in each year not exceeding the number of times mentioned in the said Schedule (H), as shall be directed by warrant under Her Majesty's sign-manual, and to be published in the *London Gazette*, at such time as they shall deem best and most convenient to fix for the general business of the county, if there shall be any cause at such places at such times to try, but as nearly as may be at equal intervals between each Court, except as hereinafter provided, and shall remain at each such place until the causes ready to be heard shall be disposed of; and each Sheriff-Clerk, or a depute appointed by him, is hereby required to attend at such places and times within his sheriffdom, and to find the necessary accommodation for holding all such Courts, on his own charges and expenses in respect of the fees allowed by this Act: Provided always, that no Sheriff-Clerk shall acquire a vested right to any increased amount of fees or emoluments to be drawn under this Act, or shall be entitled to compensation in consequence of being deprived of such increased amount of fees or emoluments, or of any future regulation thereof by any Act to be hereafter passed.

24. [*Sheriff empowered to change places and times.*].—And be it enacted, That the several Sheriffs of the several sheriffdoms, with the consent and approbation of one of Her Majesty's principal Secretaries of State, may from time to time change the places or number of times at which such Circuit Courts shall be directed to be held as aforesaid, or discontinue the same or any of them in any sheriffdom in which such Circuit Courts or any of them may be found unnecessary or inexpedient, or direct any two



of such Courts held in islands or other places where it may be deemed expedient to be held at short intervals from each other, or direct Circuit Courts to be held at such places in any sheriffdom although not mentioned in the said Schedule (H), or in such additional places in counties mentioned in the said schedule, as may seem necessary and proper; and all such additional Circuit Courts shall be held in terms of the provisions and directions of this Act.

25. [*Sheriff-Clerks to appoint deputies and to give notices.*—And be it enacted, That the Sheriff-Clerk of each sheriffdom shall attend personally or appoint a depute to act at each of the places at which Courts may be directed to be held in terms of this Act, and such depute shall in the absence of the principal clerk attend at and during the holding of such Circuit Courts, and shall thereat perform all the duties by this Act required to be performed by the Sheriff-Clerk; and if such depute shall not be resident in such place the Sheriff-Clerk may also appoint a proper person resident in such place or in its immediate vicinity to issue the summonses or complaints which may be applied for and issued under the provisions of this Act, and the principal clerk shall give or cause to be given due intimation of the name, description, and residence of each person so appointed depute clerk, and of the person appointed to issue summonses and complaints as aforesaid, by notice in the form set forth in Schedule (I) hereunto annexed, and which notice, being signed by the Sheriff-Clerk, shall, without being stamped, be a sufficient commission to such Sheriff-Clerk depute, and such notice or a copy thereof shall be affixed on or near the doors of the church of the parish within which such Court is to be held, and also, if he shall see cause, by advertisement in the newspaper or newspapers of the greatest reputed circulation in the neighbourhood, and notice shall in like manner be given by the Sheriff-Clerk, in the form of Schedule (K) hereunto annexed, of the times at which such Circuit Courts shall be fixed to be held: Provided always, that no person who shall act as depute-clerk for the purposes of this Act, and for no other purposes, shall be thereby disqualified from acting as a procurator before any Court, except the Small Debt Court in which he shall act as aforesaid, or from being registered or from voting under any Act or Acts of Parliament relative to the election of members of Parliament or of magistrates of burghs.

26. [*Actions to be brought in the place of defender's domicile.*—And be it enacted, That each Sheriff shall, three months before holding any Circuit Court in terms of this Act, by a minute entered in the sederunt book of his Court, and published in such manner as he may think proper, and of which a printed copy shall be publicly affixed at all times on the walls of every Sheriff Court room within his sheriffdom, apportion the parishes or parts of parishes which shall for the purposes of this Act be within the jurisdiction of any Small Debt Court to be held within his sheriffdom as aforesaid, and thereafter from time to time alter such apportionment as the circumstances may require, and such alteration shall be published as

aforesaid for at least three months before the same shall take effect, and all causes shall be brought before the Ordinary Small Debt Court or any Circuit Small Debt Court within the jurisdiction of which the defender shall reside, or to the jurisdiction of which he shall be amenable; Provided always, that if there shall be more defenders than one in one cause of action who shall be amenable to the jurisdiction of different Courts, or if from any other cause the Sheriff shall be satisfied that such course shall be expedient for the ends of justice, it shall be competent to the Sheriff, upon summary application in writing made by or for any pursuer lodged with the Sheriff-Clerk, or upon verbal application made by or for any pursuer in open Court, to order a summons or complaint to be issued, and the cause to be brought before his ordinary Small Debt Court, or before any of his Circuit Small Debt Courts, as shall appear most convenient; and such summons or complaint shall be issued accordingly on the Sheriff writing and subscribing thereon the name of the Court before which the same is to be heard.

27. [*Sheriff may adjourn causes to any of his other Small Debt Courts.*—And be it enacted, That the Sheriff may, where the ends of justice and the convenience of the parties require it, adjourn and remove the further hearing of or procedure in any sequestration, multiplepoinding, or any other cause from his ordinary Small Debt Court to any of his Circuit Small Debt Courts, and from any of his Circuit Small Debt Courts to his ordinary or any other Circuit Small Debt Court, or to any diet of his ordinary Court, to be there dealt with according to the provisions of this Act, or to any other time and place specially appointed for the purpose; and such order of adjournment and removal shall be held due notice to the parties of such adjournment and removal being made, unless further notice shall be ordered.

28. [*Sheriff of Moray may hold Courts at Grantown.*—And whereas, in the upper district of *Morayshire* which borders on the river *Spey*, there is no place in which Circuit Courts can be conveniently held, but such Court could be conveniently held in the village of *Grantown*, situated in a detached part of the county of *Inverness*, in the immediate vicinity of the said district of *Morayshire*: be it therefore enacted, That in case it shall be directed by one of Her Majesty's principal Secretaries of State that a Circuit Court shall be established in terms of this Act for the upper district of *Morayshire*, it shall be competent to the Sheriff of *Morayshire*, or his Substitutes, to grant warrant and to hold Courts for the trial of all causes competent under this Act, and to pronounce judgment therein, within the said village of *Grantown*, in the same way and to the same effect in all respects as if such Courts were held and warrants were granted and judgments pronounced within the said county of *Moray*; and it shall also be competent to the Sheriff-Clerk and officers of *Morayshire* to issue summonses and perform other duties authorised by this Act within the village of *Grantown* in like manner as within the county of *Moray*.

29. [*Sheriff and Sheriff-Clerk's expenses at Circuit Courts.*—And be it enacted, That an account of the travelling and other charges incurred by the Sheriff and Sheriff-Clerks in going to, living at, and returning from the places where such Circuit Courts shall be held as aforesaid, shall be rendered annually in exchequer with the other charges of the Sheriffs, and such accounts, being there audited, shall be allowed to an amount, for the Sheriff not exceeding five pounds, and for the Sheriff-Clerk not exceeding one pound ten shillings for each Court, and paid out of the public revenue of Scotland as the charges of the Sheriffs are in use to be paid.

30. [*Decree not subject to review, except as hereby provided.*—And be it enacted, That no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of execution, other than provided by this Act, either on account of any omission or irregularity or informality in the citation of proceedings, or on the merits, or on any ground or reason whatever.

31. [*Form of review provided.*—And be it enacted, That it shall be competent to any person conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before the next Circuit Court of Justiciary, or, where there are no Circuit Courts, before the High Court of Justiciary at *Edinburgh*, in the manner, and by and under the rules, limitations, conditions, and restrictions contained in the before-recited Act passed in the twentieth year of the reign of His Majesty King *George* the Second, for taking away and abolishing the heritable jurisdictions in *Scotland*, except in so far as altered by this Act: Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff; provided also, that such appeals shall be heard and determined in open Court, and that it shall be competent to the Court to correct such deviation in point of form, or to remit the cause to the Sheriff with instructions or for rehearing generally, and it shall not be competent to produce or found upon any document as evidence on the merits of the original cause which was not produced to the Sheriff when the case is heard, and to which his signature or initials have not been then affixed, which he is only to do if required, nor to found upon nor refer to the testimony of any witness not examined before the Sheriff, and whose name is not written by him when the case is heard upon the record copy of the summons, which he is to do when specially required to that effect: Provided further, that no sist or stay of the process and decree, and no certificate of appeal shall be issued by the Sheriff-Clerk, except upon consignment of the whole sum, if any, decerned for by the decree and expenses, if any,

and security found for the whole expenses which may be incurred and found due under the appeal.\*

32. [*Fees to be taken.*].—And be it enacted, That the following and no other or higher fees or dues of consignment shall be allowed to be taken for any matters done in any cause or prosecution raised under the authority of this Act.

*Clerk's Fees in Causes under this Act.*

Summons including precept of arrestment, One shilling.  
 Each copy for service, Sixpence.  
 Entering in procedure book, Sixpence.  
 Renewed warrant to arrest on dependence, and entering in book  
 One shilling.  
 Certificate loosing arrestment, One shilling.  
 Bond of caution, One shilling and sixpence.  
 Second diligence for compelling witnesses or havers to attend, One  
 shilling.  
 Decree, including extract, if demanded, One shilling.  
 Hearing after decree in absence, One shilling and sixpence.  
 Indorsation of decree or warrant, and entering in book, One shilling.  
 Receiving report of sequestration and appraisement, and entering in  
 book, One shilling.  
 Receiving report of sale under sequestration, and entering, One  
 shilling.  
 Receiving report of poinding and sale, and entering, One shilling  
 and sixpence.

*Officer's Fees, including Assistants.*

Citation of a party or intimation of counter claim, and execution of  
 citation given personally, One shilling.  
 Ditto, ditto, if citation not given personally, Sixpence.  
 Citation of a witness or haver, Sixpence.  
 Charging on decree, and returning execution of charge, One shilling.  
 Arrestment, and returning execution thereof, Sixpence.  
 Intimation of loosing arrestment, and execution thereof, Sixpence.  
 Poinding or sequestration and inventory, Two shillings and six-  
 pence.  
 Sale and report, Two shillings and sixpence.  
 Officer's travelling expenses, for each complete mile from the Cross  
 or Tron, or other usual place of measurement in the town or  
 place where the Court is held, where there is any such, or if there  
 be none such, then from the Court-house of such town or place to

\* The provisions of the Heritable Jurisdiction Act as to appeals will be found in Part VI. of the Appendix.

the place of execution of service, the distance travelled in returning after execution of the duty not to be reckoned, Sixpence.

Assistants, each *per* mile, in the same manner, Fourpence.

*Crier's Fee.*

For calling each cause, One penny, payable when summons is issued.

33. [*Table of fees to be printed and hung up.*].—And be it enacted, That an exact copy of the immediately preceding section of this Act shall be printed on each summons or complaint, and on each service copy thereof, and shall also be at all times hung up in every Sheriff-Clerk's office and in every Sheriff Court place during the holding of any Sheriff Small Debt Court; and any Sheriff-Clerk from whose office any summons or service copy thereof shall be issued not having such copy of the said section printed thereon, or at any time omitting to have such copy hung up in his office or in the Sheriff Court place as aforesaid, or not causing the roll of causes each Court-day to be publicly exhibited, or not causing the number and names of the parties in such roll to be called in their order as aforesaid, except with leave of the Sheriff upon cause shown in open Court, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person who shall prosecute for the same, and to be disposed of as the Sheriff shall direct.

34. [*Officers neglecting duty to be fined.*].—And be it enacted, That in all or any of the cases above mentioned, where any decree or warrant shall have been indorsed as aforesaid, the Sheriff's-officer of the county where such decree or warrant has been originally issued, as well as of any county wherein the same is indorsed, are hereby authorised and required to obey and enforce such decree or warrant within such other county; and any Sheriff's-officer failing to report any sequestration or poinding and sale as above directed, or violating or neglecting any other duty entrusted to him under this Act, or wilfully acting contrary to any provision thereof, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person aggrieved thereby, and to be disposed of as the Sheriff shall direct, reserving always all further claim of damages otherwise competent against any such officer, and without prejudice to the Sheriff's lawful authority to remove and punish all officers of his Court for misbehaviour or malversation in office.

35. [*Privileged persons not exempt.*].—And be it enacted, That no person whatsoever shall be exempt from the jurisdiction of the Sheriff in any cause or prosecution raised under the authority of this Act on account of privilege, as being a member of the College of Justice, or otherwise.

36. [*Courts may limit fees in causes not exceeding £8, 6s. 8d.*].—And be it enacted, That in all causes and prosecutions wherein the debt, demand, or penalty shall not exceed the value of eight pounds six shillings and

eightpence sterling, exclusive of expenses and fees of extract, which shall in future be brought or carried on before any Court not according to the summary form herein provided, it shall be lawful for the judge in such Court notwithstanding to allow no other or higher fees or expenses to be taken or paid than those above mentioned.

37. [*Meaning of words in this Act.*—And be it enacted, That in all cases in this Act or in the schedules hereto annexed, the word “Sheriff” shall be held to include Sheriff-Depute and Steward-Depute, and Sheriff-Substitute and Steward-Substitute; the words “Sheriff-Substitute” to include Steward-Substitute; the words “Sheriff Court” to include and apply to the Court of the Sheriff or Steward or their Substitutes; the words “Sheriff-Clerk” to include Steward-Clerk and Depute Sheriff-Clerk and Depute Steward-Clerk; the word “shire” or “county” to include stewardry; the word “sheriffdom” to include and be included in the words shire, county, or stewardry; the word “person” to extend to a partnership, body politic, corporate, or collegiate, as well as an individual; the word “landlord” to include any person having a right to exact rent, whether as owner, liferenter, heritable creditor in possession, principal tenant, or otherwise; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things, and every word importing the masculine gender only shall extend and be applied to a female as well as a male: Provided always that those words and expressions occurring in this clause to which more than one meaning is attached shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

38. [*Act may be repealed, &c.*—And be it enacted, That this Act may be repealed, altered, or amended by any Act or Acts to be passed during the present session of Parliament.

## SCHEDULES to which the foregoing Act refers.

### SCHEDULE (A).

#### No. 1.—*Summons or Complaint in a Civil Cause.*

A B, Sheriff of the shire of \_\_\_\_\_ to  
officers of Court, jointly and severally.

Whereas it is humbly complained to me by C D [*design him*], that E F [*design him*], defender, is owing the complainer the sum of \_\_\_\_\_  
[*here insert the origin of debt or ground of action, and, whenever possible, the*

*date of the cause of action or last date in the account*], which the said defender refuses or delays to pay; and therefore the said defender ought to be decerned and ordained to make payment to the complainer, with expenses: Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compear before me or my Substitute in the Court-house at                    upon the                    day of                    at                    of the clock, to answer at the complainer's instance in the said matter, with certification in case of failure of being held as confessed; requiring you also to deliver to the defender a copy of any account pursued for, and that ye cite witnesses and havers for both parties to compear at the said place and date, to give evidence in the said matter; and, in the meantime, that ye arrest in security the goods, effects, debts, and sums of money belonging to the defender as accords of law. Given under the hand of the Clerk of Court at                    the                    day of                    *J P, Sheriff-Clerk.*

---

No. 2.—*Citation for Defender.*

*E F*, defender, above designed, you are hereby summoned to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification set forth in the above copy of the summons or complaint against you.

This notice,                    served upon the  
day of                    by me,

*J T, Sheriff's-officer.*

---

No. 3.—*Execution of Citation of Defender.*

Upon the                    day of                    one thousand eight hundred and                    I duly summoned the above-designed *E F*, defender, to appear and answer before the Sheriff in the matter, and at the time and place, and under the certification above set forth. This I did by leaving a full copy of the above summons or complaint, with a citation thereto annexed,\*                    for the said defender [in his hands personally, or otherwise as the case may be].

*J T, Sheriff's-officer.*

---

No. 4.—*Execution of Notice of Counter Claim by Defender against Pursuer.*

Upon the                    day of                    I gave notice to *C D*, pursuer, of the above counter account [or claim] intended to be pleaded against him by *E F*, defender, in the small debt action to which the said defender was summoned to appear before the Sheriff at

\* If there is an account mentioned in                    copy of it along with a copy of the sum-  
the complaint, the officer must serve a                    mons or complaint.

upon the                      day of                      at                      of the clock.  
 This I did by leaving a copy of the above account [or notice of claim,  
*shortly explaining it*], for the said pursuer [in his hands personally, or *otherwise as the case may be*].

J T, Sheriff's-officer.

---

No. 5.—*Citation for Witnesses.*

M N [*design him*], you are hereby summoned to appear before the Sheriff  
 of the shire of                      or his Substitute, in the Court-house  
 at                      upon the                      day of                      one thousand  
 eight hundred and                      at                      of the clock, to bear wit-  
 ness for the [pursuer or defender, *as the case may be*], in the summons or  
 complaint at the instance of C D [*design him*] against E F [*design him*], and  
 that under the penalty of forty shillings if you fail to attend.

This notice served on the                      day of                      by me,  
 J T, Sheriff-officer.

---

No. 6.—*Execution of Citation of Witnesses.*

Upon the                      day of                      one thousand eight hundred  
 and                      I duly summoned M N, &c. [*design them*], to appear before  
 the Sheriff of the shire of                      , or his Substitute, in the Court-  
 house at                      upon the                      day of                      of the  
 one thousand eight hundred and                      at                      of the  
 clock, to bear witness for the                      in the summons or complaint at  
 the instance of C D [*design him*] against E F [*design him*]. This I did by  
 delivering a just copy of citation, signed by me, to the said M N [*per-  
 sonally, or otherwise as the case may be*].

J T, Sheriff-officer.

---

No. 7.—*Decree for Pursuer in a Civil Cause.*

At                      the                      day of                      one thousand  
 eight hundred and                      the Sheriff of the shire of  
 finds the within-designed                      defender, liable to the pursuer in  
 the sum of                      with                      of expenses, and decerns and  
 ordains instant execution by arrestment, and also execution to pass hereon  
 by poinding and sale and imprisonment, if the same be competent, after  
 free days.

J P, Sheriff-Clerk.

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No. 8.—*Summons of Complaint for Statutory Penalty.*

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No. 9.—*Decree for Prosecutor in Prosecution for Penalty.*



No. 10.—*Decree of Absolver, with Expenses.*[*The following will answer either for civil causes or prosecutions for penalties.*]

At the day of one thousand eight hundred and the Sheriff of the shire of assoilzies the within-designed *E F*, defender, from the within complaint, and finds the within-designed *C D*, pursuer, liable to him in the sum of of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale after free days.\*

J P, Sheriff-Clerk.

No. 11.—*Charge on Decree.*

*E F*, above-designed, you are hereby charged to implement the decree of which, and of the complaint whereon the same proceeded, the above is a copy, within days from this date, under pain of poinding and sale without further notice. This charge given by me, on the day of before *O P* [*design him*].

J T, Sheriff-officer.

No. 12.—*Execution of Charge.*[*To be on the same paper with the complaint and decree.*]

On the day of one thousand eight hundred and I duly charged *E F*, above-designed, to implement the above decree within the time and under the pains therein expressed. This I did by delivering a just copy of the foregoing complaint and decree, and a charge thereto annexed subscribed by me, to the said *E F* [*personally, or as the case may be*], before *O P* [*design him*], witness hereto, with me subscribing.

J T, Sheriff-officer.

*O P*, witness.

## SCHEDULE (B).

[*Summons of Sequestration and Sale at the instance of a Landlord.*]

*A B*, Sheriff of the shire of to officers of Court, jointly and severally.

Whereas it is humbly complained to me by *C D*, pursuer [*design him*], that *E F*, defender [*design him*], is owing to the pursuer the sum of , being the rent for [*describe the premises*], possessed by him from to [*if any partial payments have been made*,

\* Where the pursuer does not return the original summons, the above decree may be written on the copy served on the defender.

*let them be here stated*], and which rent [*or balance of rent, as the case may be*] the said defender refuses or delays to pay : Therefore warrant ought forthwith to be granted to inventory, appraise, sequesterate, and, if need be, secure the goods and effects upon or within the said premises, and decree ought to be pronounced decerning the defender to make payment of the said rent [*or balance of rent, as the case may be*] to the pursuer, with expenses, and warrant ought also to be granted to sell the goods and effects sequestered in payment of the said rent [*or balance of rent, as the case may be*] and expenses : Herefore it is my will, that on sight hereof ye lawfully summon the said defender to compare before me or my Substitute, within the Court-house of                      upon the                      day of                      at                      of the clock, to answer at the pursuer's instance in the said matter, with certification, in case of failure, of being held as confessed, and decree and warrant pronounced as craved : And my will further is, that ye forthwith inventory, sequesterate, and, if need be, secure the goods and effects upon or within the said premises until the further orders of Court, or until the said defender shall make payment to the pursuer of the amount of the rents pursued for, with the expenses, or shall consign in the hands of the Clerk of Court the amount of the rents pursued for, with two pounds sterling to cover expenses ; and that ye cite witnesses and havers for both parties to compare at the said place and date, to give evidence in the said matter. Given under the hand of the Clerk of Court at the                      day of

J P, Sheriff-Clerk.

[*After hearing the cause, the decree and procedure in the sequestration and sale will be similar to the forms in ordinary causes, the words "sequestration" and "sequestered" being introduced when necessary, instead of "poinding" and "poinded."*]

#### SCHEDULE (C).

##### *Arrestment on the Dependence of an Action.*

By virtue of a warrant of the Sheriff of the shire of                      , given under the hand of the Clerk of Court at                      on the                      day of                      for arrestment on the dependence of an action raised before the said Sheriff at the instance of *C D* [*design him*], complainer, against *E F* [*design him*], defender, I hereby fence and arrest, in the hands of you *K L* [*design him*], all sums of money owing by you to the said defender, or to any other person, for his use and behoof, and all goods and effects in your custody belonging to the said defender [*or, in the case of ships and maritime subjects, say, I hereby fence and arrest the ship M of N presently lying in the harbour of O, with her boats, furniture, and apparelling, or other maritime subject, that to an amount or*

extent not exceeding the value of eight pounds six shillings and eightpence sterling, all to remain under sure fence and arrestment, at the complainer's instance, until due consignment be made, or until sufficient caution be found as accords of law. This I do on the                      day of                      before O P [*design him*], by delivery of a copy of this execution to you [*personally, or as the case may be*].

J T, Sheriff-officer.

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*Execution of Arrestment on the Dependence of an Action.*

[*To be on the same paper with the summons or other warrant of arrestment.*]

Upon the                      day of                      , one thousand eight hundred and                      , betwixt the hours of                      and                      , by virtue of the foregoing warrant of arrestment, I lawfully fenced and arrested in the hands of K L [*design him*], all sums of money owing by him to the foresaid E F, defender, or to any other person, for his use and behoof, and all goods and effects in the custody of the said arrestee belonging to the said defender [*or, in case of ships or maritime subjects, as before*], and that to an amount or extent not exceeding the value of eight pounds six shillings and eightpence sterling, all to remain under sure fence and arrestment, at the foresaid complainer's instance, until due consignment be made, or until sufficient caution be found as accords of law. This I did by delivering a just copy of arrestment, subscribed by me, to the said arrestee personally [*or as the case may be*], before O P [*design him*], hereto with me subscribing.

J T, Sheriff-officer.

O P, witness.

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*Bond or Enactment of Caution for Loosing Arrestment.*

At                      on                      day of                      one thousand eight hundred and                      , compeared G H [*design him*], who hereby judicially binds himself, his heirs, executors, and successors, as cautioners acted in the Sheriff-Court books of the shire of                      for E F [*design him*], common debtor, against whom arrestment was used at the instance of C D [*design him*], in the hands of K L [*design him*], on the                      day of                      in virtue of [*describe the warrant*], dated the                      day of                      , that the sums of money, goods, and effects owing or belonging to the said common debtor, arrested as aforesaid, shall be made forthcoming as accords of law.

G H.

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*Certificate for Loosing Arrestment used on the Dependence of an Action.*

Whereas arrestment was used on the dependence of an action at the instance of C D [*design him*] against E F [*design him*], in the hands of K L

[*design him, or as the case may be*], on the \_\_\_\_\_ day of \_\_\_\_\_, by virtue of a warrant of the Sheriff of the shire of \_\_\_\_\_ given under the hand of the Clerk of Court at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ : And whereas the said *E F* has now made sufficient consignment in the hands of the Sheriff-Clerk of \_\_\_\_\_ [or, if caution has been found, say] has found sufficient caution acted in the Sheriff-Court books of \_\_\_\_\_ by *G H* [*design him*], his cautioner [*here state the nature of the caution*], in order to the loosing of the said arrestment, warrant for loosing the said arrestment is hereby granted accordingly. Given under the hand of the Clerk of Court at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_

J P, Sheriff-Clerk.

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#### *Intimation of Loosing Arrestment.*

[*To be on the same paper with a copy of the foregoing warrant.*]

*K L* [*design him*], take notice, that by virtue of the warrant, whereof the above is a copy, the arrestment on the dependence of the action above mentioned used in your hands at the instance of the foresaid *C D* against the foresaid *E F*, is loosed and taken off. This notice served on the \_\_\_\_\_ day of \_\_\_\_\_ by me,

J T, Sheriff-officer.

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#### *Execution of Intimation of Loosing Arrestment.*

[*To be on the same paper with the original warrant for loosing the arrestment.*]

Upon the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_ I duly intimated the above warrant to *K L* [*design him*], arrestee. This I did by leaving a full copy thereof, and intimation thereon, subscribed by me, for him [in his hands personally, or as the case may be.]

J T, Sheriff-officer.

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### SCHEDULE (D).

#### *Summons of Complaint in cases of Forthcoming.*

*A B*, Sheriff of the shire of \_\_\_\_\_ to \_\_\_\_\_ officer of Court, jointly and severally.

Whereas it is humbly complained to me by *C D* [*designation*], upon and against *K L* [*designation*], arrestee, and *E F* [*designation*], common debtor, that the said common debtor is owing the complainer the sum of \_\_\_\_\_ contained in [*describe shortly the decret, or bill, or bond et cætera, by which the debt is constituted*], and that the complainer on the

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day of                      years, in virtue of a warrant by                      dated the  
                                  day of                      arrested in the hands of the arrestee [*here  
 insert the terms of the arrestment used*], which ought to be made forthcoming  
 to the complainer : Therefore the said arrestee, and the said common  
 debtor for his interest, ought to be decerned and ordained to make forth-  
 coming, pay, and deliver to the complainer the money, goods, and effects  
 arrested as aforesaid, or so much thereof as will satisfy and pay the said  
 sum of                      owing to the complainer as aforesaid : Herefore it is  
 my will, that on sight hereof ye lawfully summon the said arrestee, and  
 the said common debtor for his interest, to compear before me or my Sub-  
 stitute in the Court-house at                      upon the                      day of  
                                  years, at                      of the clock, to answer at the com-  
 plainer's instance in the said matter, with certification in case of failure  
 of being held as confessed ; and that ye cite witnesses and havers for both  
 parties to compear at the said place and date to give evidence in the said  
 matter. Given under the hand of the Clerk of Court at                      the  
                                  day of                      years.

J P, Sheriff-Clerk.

[*The citations and executions, and decrees for the defender, with expenses,  
 may be the same as in Schedule (A).*]

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*Decree for the Pursuer in cases of Forthcoming.*

At                      the                      day of                      one thousand  
 eight hundred and                      the Sheriff for the shire of  
 decerns and ordains the within-designed                      arrestee, to make  
 forthcoming, pay, and deliver to the also within-designed  
 pursuer [*if the arrestee has money arrested in his hands the rest of the judg-  
 ment will be the same as in ordinary cases ; if there are goods and effects to be  
 made forthcoming, the rest of the judgment will be as follows*], the arrested  
 goods and effects following ; videlicet,                      , and grants warrant to  
 sell the same, or as much thereof as will satisfy the sum of  
 and                      of expenses of process and the expense of sale ; and  
 failing the said arrestee making forthcoming and delivering the said goods  
 and effects within                      , then to make payment to the said  
 pursuer of the said sum of                      , for recovery of which sums, the  
 said period being elapsed without forthcoming and delivery of the said  
 goods and effects, ordains instant execution by arrestment, and also execu-  
 tion to pass hereon by pouncing and sale and imprisonment, if the same be  
 competent, after                      free days.

J P, Sheriff-Clerk.

## SCHEDULE (E).

*Summons of Multiplepounding.*

*A B*, Sheriff of the shire of \_\_\_\_\_ to \_\_\_\_\_ officers  
of Court, jointly and severally.

Whereas it is humbly shown to me by *A B*, pursuer [*design him*], that he is holder of [*here state the fund or subject in medio, and if necessary refer to the account thereof produced*], belonging to *E F*, common debtor [*design him*], which fund the pursuer is ready to pay [*or deliver*] to the said common debtor, or to whomsoever shall be found to have best right thereto, but he is distressed by claims being made thereon by the persons following, videlicet [*here state the names and designations of all the claimants, so far as known to the holder or raiser of the action*]; wherefore the said pursuer ought to be found liable only in once and single payment [*or delivery*] of the said fund or subject to whomsoever of the said parties or others interested shall be found by me to have best right thereto [*or, in the meantime, consignment ought to be ordered of the fund or subject, or sale of the subject in medio*], deducting the pursuer's expenses, and decree ought to be pronounced accordingly, and all other parties ought to be prohibited from molesting the pursuer thereanent in all time coming: Herefore it is my will, that on sight hereof ye lawfully summon the said common debtor and the said claimants [*and, in case of the action being raised by a claimant in name of the holder, it will be necessary also to summon the nominal pursuer*], to compare before me or my Substitute in the Court-house of \_\_\_\_\_ upon the day of \_\_\_\_\_ at \_\_\_\_\_ of the clock, to attend to their several interests in the said matter, with certification in case of failure of being held as confessed; requiring you also deliver to the said common debtor a copy of any account produced with the summons, and that he cite witnesses and havers for all parties to compare at the said place and date to give evidence in the said matter. Given under the hand of the Clerk of the Court at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_

*J P*, Sheriff-Clerk.

*Form of Claim in Multiplepounding.*

I, *A B* [*design him*], hereby claim to be preferred on the fund in the multiplepounding raised in name of [*mention the raiser*], against [*mention the defenders*], for [*state the claim*] of principal due to me by [*here state generally the ground of debt, whether by bond, bill, account, &c., as the case may be*], with interest from \_\_\_\_\_, with expenses.

*A B*.

*Form of Interlocutor of Preference.*Prefers [*here design him*], claimant for [*here specify the sum*].[*To be signed by the Sheriff.*][*The citations and procedure to be as nearly as may be in the forms in other causes, and warrant to sell the subjects forming the fund in medio to be granted and carried into effect in the ordinary form.*]

## SCHEDULE (F).

| No. | Dates of Complaints. | Pursuers. | Defenders. | Nature and Amount. | How Cited. | By what Officer. | Leave and Cause of Procurator's Appearance. | Interlocutors and Decrees. |
|-----|----------------------|-----------|------------|--------------------|------------|------------------|---|----------------------------|
|     |                      |           |            |                    |            |                  |   |                            |

*N.B.*—After the name of each pursuer and defender let the letter P or A be added, in order to mark whether the party was present or absent when the cause was called ; and should the party appear by or with any other person, or a procurator, his or her name shall be marked as so appearing. Let expenses be also entered under the head of "Interlocutors."

## SCHEDULE (G).

*Report of Sequestration or Poinding and Sale.*[*To be varied according to circumstances.*]

Report of the sequestration or poinding and sale at the instance of *C D* [*design him*] against *E F* [*design him*].

| Lots. | EFFECTS.                      | Appraised at | Sold at |
|-------|-------------------------------|--------------|---------|
|       |                               | £ s. d.      | £ s. d. |
| 1.    | An eight-day clock, . . . .   | 4 0 0        | 4 10 0  |
| 2.    | Six chairs, at 6s., . . . .   | 1 16 0       | 1 18 0  |
| 3.    | One table, . . . .            | 0 8 0        | 0 8 0   |
| 4.    | One chest of drawers, . . . . | 1 12 0       | 1 12 0  |
|       |                               | 7 16 0       | 8 8 0   |

**NOTE.**—If the effects are not sold, the tenor of the report must be altered according to the state of the fact; for instance, ["I exposed the said goods and effects to public sale, but no person having offered the appraised value, therefore I declared the same to belong to the said C D at the said respective appraised value, in payment to that amount of the sums in said decree."] In case the goods pointed, or part of them, shall sell for more than the sums in the decree, and expenses of pointing and sale, say, ["I sold part of the said effects,—viz., Lots 1, 2, and 3, by public roup to the highest bidder at the prices above specified in the second column for each of said lots respectively, and amounting in all to [here insert the amount in words]; and I returned to the said debtor the sum of                      being the overplus of the price, after payment of the sum decreed for past due, and the sum of                      being the expenses of pointing and sale conform to Act of Parliament; and I also returned to the said debtor the effects specified in the other lots above enumerated.]



## SCHEDULE (H).

*Places at which Circuits are to be held.*

\* \* \* \* \*

## SCHEDULE (I).

*Notice.*

*A B* [add designation], residing \_\_\_\_\_, is the depute Sheriff-Clerk to whom application for summonses and everything else necessary for the Sheriff's circuit at this place for small debt causes must be made [or, in case the depute shall not be resident, say] *A B* [add designation and place of residence] is the depute Sheriff-Clerk who will officiate at \_\_\_\_\_, in the Sheriff's Small Debt Circuit Court, and *C D* [add designation], residing at \_\_\_\_\_, is the person who will issue summonses or complaints to be brought in such Court.

[Date.]

[Place.]

## SCHEDULE (K).

*Notice.*

The Sheriff will hold Circuit Courts for small debt causes at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ of the clock, and on every [fix the time periodically or, if not, new notice to be given]. *A B* [add designation and residence] is the clerk for this place.

[Date.]

[Place.]

34 & 35 Vict. c. 42.—An ACT to amend the Process of Citation in Scotland.—13th July, 1871.

WHEREAS by an Act of the Scottish Parliament passed in the reign of King James V., anno 1540, c. 75, entitled "The ourdour of sumounding of all persones in civill actiones," the affixing of "copies of letters or precepts" to the gate or door of a house, after the officer has given six knocks and failed to get entrance thereto, was made a lawful and sufficient citation :

And whereas great evils have arisen through the practice of that mode of citation, and it is expedient that it be restricted, and also that the present process of citation be in some other respects amended :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*—The short title of this Act shall be “The Citation Amendment (Scotland) Act.”

2. [*Abolition of lock-hole citation, and where defender has removed.*—No summons, complaint, or decree and warrant, or other order or writ following upon such summons or complaint issued by any Small Debt Court in Scotland, shall be legally or validly served,—

(1.) By being affixed to the gate or door of any house or premises ; or,

(2.) Where the defender has removed from such house or premises by being left in the hands of an inmate thereof, save as hereinafter excepted.

3. [*In certain cases substituting registered letter by post.*—Where an officer of any Small Debt Court is satisfied that the defender named in any summons, complaint, decree and warrant, or other order of such Small Debt Court or writ following upon such summons or complaint, is refusing access or concealing himself to avoid citation or service, or has within a period of forty days removed from the house or premises occupied by him, his place of dwelling for the time not being known, it shall be lawful for such officer, after he has affixed to the gate or door of such house or premises, or left in the hands of an inmate there, the said summons, complaint, decree and warrant, or other order or writ, to send to the address which after diligent inquiry he may deem most likely to find the defender, or to his last known address, a registered letter by post containing a copy of such summons, complaint, decree and warrant, or other order or writ ; and the affixing or leaving of such summons, complaint, decree and warrant, or other order or writ, and the posting of such intimation, shall constitute a legal and valid citation or service: Provided always, that the execution to be returned by such officer shall state that he endeavoured to effect service at the defender's last known dwelling-place, and the circumstances that prevented it, and shall be accompanied by the post-office receipt for the registration.

4. [*Witnesses unnecessary.*—In all cases before the Small Debt Courts and proceedings therein, it shall not, except in cases of poinding, sequestrating, or charging, be necessary for any officer to be accompanied by any witness or concurrent.

5. [*Interpretation of defender.*—The word defender shall mean and include the person or persons named in and called upon to answer any summons, complaint, decree and warrant, or other order or writ or proceeding in the Small Debt Courts.

6. [*Application of Act.*—Nothing in this Act shall apply to the proceedings of any other Courts than the Small Debt Courts of the Sheriffs and Justices of the Peace.

## PART IV.

## DEBTS RECOVERY COURT.

30 & 31 Vict. c. 96.—An ACT to Facilitate the Recovery of certain Debts in the Sheriff Courts in Scotland,—12th August, 1867.

WHEREAS an Act was passed in the first year of the reign of her present Majesty, intituled An Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the trial of Small Debt Causes by the Sheriffs in *Scotland* (7 Will. IV. & 1 Vict. c. 41); and another Act was passed in the Session of Parliament held in the sixteenth and seventeenth years of the reign of her present Majesty, intituled An Act to facilitate Procedure in the Sheriff Courts in *Scotland* (16 & 17 Vict. c. 80):

And whereas it is expedient to make further provision to facilitate the recovery of certain debts in the Sheriff Courts in *Scotland*:

Be it therefore enacted—

1. [*Short title.*—This Act shall be cited for all purposes as the “Debts Recovery (*Scotland*) Act, 1867.”

2. [*Causes between £12 and £50 which may be tried under this Act.*—From and after the passing of this Act, it shall be lawful for any Sheriff in *Scotland*, within his sheriffdom, to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all actions of debt that may competently be brought before him for house mailla, men's ordinaries, servants' fees, merchants' accounts, and other the like debts, wherein the debt shall exceed the value of twelve pounds sterling, exclusive of expenses and dues of extract, but shall not exceed the value of fifty pounds sterling, exclusive as aforesaid: Provided always that the pursuer shall in all cases be held to have passed from and abandoned any remaining portion of any such debt beyond the sum actually concluded for in any such action.

3. [*Proceedings to begin by summons or complaint, as in sect. 3 of 7 Will. IV. & 1 Vict. c. 41.*—All such actions which the pursuers thereof

shall choose to have heard and determined according to the summary mode hereby provided shall proceed upon summons or complaint, agreeably to the form and subject to all the provisions contained in the third section of the first-recited Act and relative schedules, except as herein provided : Provided always that the summons or complaint shall not contain and shall not constitute a warrant to cite witnesses or havers.

4. [*Parties may appear by procurators.*].—In all actions under this Act it shall be competent for the parties or any of them to appear and plead personally, or by any person *bona fide* employed by them in their usual business, or by a procurator of Court; and, except in applications for sequestration and sale of a tenant's effects for recovery of rent, it shall be competent for agents qualified to practise before the Court of Session to act as procurators or agents before the Sheriff Court of *Edinburgh* in any cause exceeding the value of twenty-five pounds exclusive of expenses and dues of extract raised under the authority of this Act, so long as such cause is not remitted to the ordinary roll of such Sheriff Court.

5. [*Certain sections of 7 Will. IV. & 1 Vict. c. 41, incorporated with this Act.*].—The provisions contained in the third, fifth, sixth, eighth, ninth, tenth, twelfth, eighteenth, nineteenth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-eighth, thirty-fourth, thirty-fifth, and thirty-sixth sections of the first-recited Act and relative schedules shall be held as incorporated in the present Act, except in so far as they may be inconsistent with any of the provisions hereof : Provided always that the foresaid section of the first-recited Act shall for the purposes of this Act be read and construed as if they expressly related to actions of the nature and value set forth in the second section of this Act, instead of to actions of the nature and value set forth in the said sections of the first-recited Act, or in the twenty-sixth section of the second-recited Act, and further that the fifth section of the said first-recited Act shall be read and construed as if it related expressly to the recovery of rents or balances of rents exceeding twelve pounds and not exceeding fifty pounds sterling, and that the tenth section of the said Act shall be read and construed as if it related expressly to the distribution of funds or subjects exceeding the value of twelve pounds and not exceeding the value of fifty pounds sterling, and that the counter claims or claims in actions of multiplepounding which may be made under the authority of this Act shall be of the nature and value set forth in the second section hereof, and that wherever in the foresaid sections of the said first-recited Act the words "Ordinary Small Debt Court," or "Circuit Small Debt Court," or such like words, are used, they shall, for the purposes of this Act be held to mean and include Ordinary Courts or Circuit Courts at which causes tried under the authority of this Act are or may be set down for trial : Provided also, that if any person shall make a claim in any action of multiplepounding raised under the authority of this Act, or a counter claim in any other action raised under this Act, which claim or counter

claim, as the case may be, is not of the nature and value set forth in the second section hereof, the Sheriff shall, if he thinks fit, remit the action to his ordinary roll : Provided further that, notwithstanding the terms of the sixth section of the first-recited Act, arrestments laid on under the authority of this Act shall not prescribe till the expiry of three years, according to the provisions of the twenty-second section of an Act passed in the first and second years of the reign of her present Majesty, intituled *An Act to amend the Law of Scotland in matters relating to Personal Diligence, Arrestments, and POUNDINGS* (1 & 2 Vict. c. 114).

6. [*Decrees in absence and their effect.*].—When the defender who has been duly cited shall fail to appear he shall be held confessed, and the other party shall obtain decree against him ; and in like manner if the pursuer shall fail to appear the defender shall obtain decree of absolvitor, unless in either case a sufficient excuse for delay shall be stated, on which account it shall at all times be competent for the Sheriff to adjourn any case to the next or any other Court-day, and to any place at which he holds a Court for the trial of causes under this Act or any other Act, and to ordain the parties then to attend : Provided always, that a decree in absence (condemnator or absolvitor) obtained under this Act shall be as nearly as may be in the same form, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree in absence obtained under the first-recited Act.

7. [*Hearing in cases of decree in absence.*].—The provisions contained in the sixteenth section of the first-recited Act shall be held as incorporated in the present Act : Provided always, that it shall not be competent to insert in the warrant for hearing any warrant to cite witnesses and havers : Provided also, that, notwithstanding the terms of the said sixteenth section, it shall be competent for the pursuer of any action under the authority of this Act, against whom decree of absolvitor has passed in absence, to apply for and obtain a warrant for hearing at any time within three calendar months thereafter, in the same manner and under the same conditions as those provided in the said sixteenth section, and such warrant for hearing shall have the like force and effect as if obtained under the said section.

8. [*If case unsuitable for summary trial, Sheriff may remit to ordinary roll ; otherwise shall hear case and give judgment.*].—Where both parties shall appear at the diet mentioned in the summons and complaint, or at any adjournment thereof, or at the diet for hearing under the immediately preceding section, the Sheriff shall inquire into the nature of the action and of the defence thereto, and shall make a short note of the pleas of parties (hereinafter called the note of pleas), which shall form part of the process ; and where it shall appear to the Sheriff that the case is of such a nature that it cannot, with due regard to the ends of justice, be disposed of according to the summary procedure provided by this Act, he may remit the same to his ordinary roll ; and the case, being so remitted, shall be proceeded

with in the same manner as cases remitted under the first-recited Act from the small debt roll to the ordinary roll of the Sheriff Court are now proceeded with ; and it shall not be competent to take any objection that such case so remitted was not of the nature or value set forth in the second section hereof ; but if it shall not appear to be necessary for the ends of justice that the case should be remitted to the ordinary roll, the Sheriff shall fix a time (which shall be as early as may be) and place for proceeding to try and determine the same, and shall ordain the parties then to attend, and shall grant warrant to cite witnesses and havers (which warrant shall be signed by the Sheriff-Clerk, and shall have the same force and effect as if it had been contained in the summons and complaint) ; and at said time and place, or at some adjourned time and place (which adjournment the Sheriff shall only grant when the ends of justice require it), the Sheriff shall proceed to hear the parties *visd voce*, and examine witnesses or havers upon oath, and may also examine the parties, and may put them or any of them upon oath, and, if he should see cause, may remit to persons of skill to report, or to any person competent to take and report in writing, the evidence of witnesses or havers, or the oath of any party who may be unable to attend, upon special cause shown, and such cause shall in all cases be entered in the book of causes kept by the Sheriff-Clerk hereinafter mentioned, due notice of the examination being given to both parties, and thereupon the Sheriff may pronounce judgment, and the judgment shall, unless appealed from as after-mentioned, be as nearly as may be in the same form, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the thirteenth section of the first-recited Act.

9. [*If required, Sheriff shall take note of evidence, and pronounce findings in law and fact.*].—Unless required by either party, it shall not be necessary for the Sheriff to take any note of the evidence or of the facts admitted by the parties, but upon such requisition, which shall only be competently made before any parole evidence has been led, and not afterwards, he shall take a note of the evidence and of the facts admitted (hereinafter called the note of evidence), setting forth the witnesses examined and the testimony given by each, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received, which note of the evidence shall be forthwith lodged in process ; and the Sheriff-Clerk shall mark the documents admitted in evidence, and also separately any documents tendered and rejected ; and the diet of proof shall not be adjourned unless on special cause shown, which shall be set forth in the note of evidence at the time of making the adjournment : Provided always, that the Sheriff shall either take such note with his own hand, or may dictate it to a clerk, or, on the motion of either of the parties, and in the meantime at the expense of the party or parties so

moving (said expenses to be ultimately disposed of as expenses in the cause), to a writer skilled in shorthand writing, to whom the oath *de fidei administratione officii* shall be administered; and the said shorthand writer shall afterwards write out in full the note of evidence so taken by him, and the Sheriff shall certify the same as correct, and the evidence of such witness shall be read over to him and shall be signed by him, except where it shall have been taken in shorthand; and where the evidence has been recorded as above provided for, the Sheriff shall pronounce and sign and date an interlocutor, setting forth the separate findings in law and in fact upon which he has proceeded in giving judgment; and such interlocutor shall form part of the process, and if not appealed from, as hereinafter provided, shall be final and conclusive, and not subject to review by any Court whatever; and the judgment of the Sheriff shall at the expiry of the time allowed for appeal hereinafter mentioned, and if not appealed from during the same, be extracted, as nearly as may be, in the mode provided in the thirteenth section and relative schedule of the first-recited Act, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the last-mentioned section of the said first-recited Act.

10. [*Appeal competent only when note of evidence taken.*].—Where neither party has, in the manner above provided, required the Sheriff to take a note of the evidence, it shall not be competent to appeal against the judgment which he shall pronounce, in so far as the findings in fact pronounced by him are concerned, and the said findings shall be final and conclusive, and not subject to review by any Court whatever: Provided also, that it shall not in any case be competent to appeal until judgment has been pronounced by the Sheriff finally disposing of the cause, but an appeal when taken shall have the effect of submitting to review all the previous proceedings and interlocutors.

11. [*Appeal where case heard by Sheriff-Substitute.*].—Subject to the proceedings contained in the immediately preceding section, where the case has been heard and the judgment has been given by the Sheriff-Substitute, it shall be competent for either party to appeal against such judgment to the Sheriff; and the party who proposes to appeal against the same shall, within eight days, or in cases depending before the Sheriff of *Orkney* and *Shetland* within sixteen days, from the date of the interlocutor before mentioned, engross and sign by himself or by his procurator, under the said interlocutor, the words, "I appeal against the judgment of the Sheriff-Substitute" (failing which the judgment of the Sheriff-Substitute shall be, as hereinbefore provided, final and conclusive, and not subject to review by any Court whatever); and it shall be competent for the appellant to subjoin to his appeal at the time of engrossing it a note of the legal authorities upon which he founds; and the Sheriff-Clerk shall forthwith transmit to the Sheriff the summons or complaint, the interlocutor of the Sheriff-Substitute, the note of pleas, and the note of evidence, with the productions

made, if any, and the Sheriff shall, without delay consider the appeal, and shall affirm or alter the judgment of the Sheriff-Substitute, and shall without delay pronounce such judgment as may be right, and shall set forth in an interlocutor (which he shall transmit along with the process to the Sheriff-Clerk) the terms of his judgment, and if he shall have altered that of the Sheriff-Substitute, he shall set forth the findings in fact and law upon which he proceeded in giving judgment: Provided always, that, if it shall seem proper, the Sheriff may order the case to be reheard, and the evidence in the cause taken of new or additional evidence therein to be taken, either before himself or before the Sheriff-Substitute, or before a commissioner if otherwise competent, with such instructions as he shall deem right; and the judgment of the Sheriff shall at the expiry of the period allowed for appeal hereinafter mentioned, and if not appealed from during the same, be extracted as nearly as may be in the same mode, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the thirteenth section of the first-recited Act and relative schedule.

12. [*Appeal where case heard by Sheriff-Depute in first instance.*—Subject to the provisions contained in the tenth section hereof, and where the cause exceeds the sum of twenty-five pounds sterling, where the case has been heard and the judgment pronounced by the Sheriff (and not by the Sheriff-Substitute) in the first instance, it shall be competent for either party to appeal against such judgment to either of the Divisions of the Court of Session, and the party who proposes to appeal against such judgment shall within eight days, or in cases depending before the Sheriff of *Orkney* and *Shetland* within sixteen days, from the date of the Sheriff's interlocutor before mentioned, engross and sign, by himself or by his procurator, under the said interlocutor, the words, "I appeal against the judgment of the Sheriff to the

Division of the Court of Session" (failing which the judgment of the Sheriff shall, as hereinbefore provided, be final and conclusive, and not subject to review by any Court whatever); and the Sheriff-Clerk shall forthwith transmit to one of the principal clerks of the Division to which the appeal is taken (or to one of the principal clerks of the First Division if the Division is not named in the appeal) the whole process; and the Division shall, when the cause is brought before them as hereinafter provided, hear the appeal without any written pleadings, and shall affirm or alter the judgment of the Sheriff, and shall remit to him, or to the Sheriff-Substitute, to decern accordingly, or to pronounce such other judgment as shall seem just; and such decree shall be extracted, as nearly as may be, in the same mode, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the thirteenth section of the first recited Act: Provided always, that, if it shall seem proper, the Division may order the case to be reheard, and the evidence taken of new or additional evidence to be taken by the Sheriff or Sheriff-Substitute, with



such directions as shall seem right; and the decree pronounced by the Sheriff or Sheriff-Substitute upon such rehearing shall be treated in all respects as if it had been pronounced by the Sheriff or Sheriff-Substitute in the first instance: Provided also, that any judgment or order pronounced by the Division shall be final and conclusive, and not subject to review by any Court.

13. [*Appeal where case heard by Sheriff on appeal from the Sheriff-Substitute.*—Where the case has been heard by the Sheriff on appeal, and judgment pronounced by him as above provided for, it shall be the duty of the Sheriff-Clerk, immediately on receiving the Sheriff's interlocutor, to transmit a copy thereof through the post-office to the parties or their procurators; and within eight days, or within the sheriffdom of *Orkney and Shetland* within sixteen days, after the date of such transmission it shall be competent for either of the parties to appeal against his (the Sheriff's) judgment in the same manner, and to the same effect, and under the same limitations as provided for in the immediately preceding section with regard to appeals from judgments of the Sheriff in the first instance.

14. [*As to printing of papers on appeal to Court of Session.*—When a process shall be transmitted by the Sheriff-Clerk to one of the principal clerks of either Division in the Court of Session as hereinbefore provided, the clerk to whom the process is so transmitted shall engross under the appeal a certificate setting forth the date when he received the process; and the party insisting in the appeal shall within ten days of such date, if the Court be then sitting, or on or before the third sederunt day in the next ensuing session if the process shall be received as aforesaid during vacation or recess, apply by written note to the Lord President of the Division to which the appeal has been taken, the presenting of which note he shall at the same time intimate by letter to the respondent or his known agent, craving his Lordship to move the Court to order the said appeal to the summar roll; and it shall be competent for such Division, before hearing such appeal, to order the appellant to print and box such papers as shall be necessary, and to furnish such printed copies thereof to the respondent as they shall direct; and the expense of such printing shall, in the first instance, be borne by the appellant, but shall afterwards be treated as part of the general expenses of the appeal: Provided always, that if the appellant shall fail to bring his appeal before the Division, by note as aforesaid, he shall be held to have fallen from the same, and the process shall forthwith be re-transmitted to the Sheriff-Clerk, and the judgment complained of shall thereupon become final, and shall be treated in all respects in like manner as if no appeal had been taken against the same.

15. [*Book of causes, &c., to be kept.*—The Sheriff-Clerk shall keep a book wherein shall be entered all causes conducted under the authority of this Act, setting forth the names and designations of the parties, and whether present or absent at the calling of the cause, the nature and amount of the claim, and date of giving it in, the mode of citation, the several deliverances

or interlocutors of the Sheriff (except those interlocutors setting forth at length the separate findings in law and in fact upon which any judgment of the Sheriff shall have proceeded, of which interlocutors the dates only shall be entered in the book of causes), the dates of appeal, if any, and the final decree, with the date thereof, which book shall be signed each Court-day by the Sheriff; and the said entries by the clerk shall be according to the Schedule (A) annexed to this Act, or with such additions as the Sheriff shall appoint; and the Sheriff-Clerk shall also keep a book in which he shall enter, in the form of Schedule (B) annexed to this Act, every cause transmitted to the Sheriff or Sheriff-Substitute, in order to be advised, specifying the Sheriff to whom the same has been transmitted, the date of such transmission, the date of the cause being returned advised by the Sheriff or Sheriff-Substitute, the date of intimating the Sheriff's judgment to the parties, the date of transmitting the cause or appeal to the Court of Session, the date of the cause being returned advised by the Court of Session or being returned in consequence of the appeal having fallen for want of being insisted in, and any remarks which the Sheriff may have ordered to be entered in such book relative to any such cause; and the Sheriff-Clerk shall further keep a book or books containing a register or registers of all indorsements of decrees and warrants issued in other counties, and of all sequestrations, and of all reports of all poindings and sales of goods and effects under sequestrations or poindings, which registers shall be open and patent at office hours to all concerned, without fee; and the Sheriff-Clerk shall make up a roll of the causes to be tried on each Court-day under this Act, separate from the roll of causes to be tried under the said recited Acts, and shall cause a copy thereof to be exhibited to the public on a patent part of the Court-house at least one hour before the time of meeting of such Court, and which shall continue there during the time the Court shall be sitting; and the Sheriff-Clerk, or an officer of Court, shall audibly call the causes in such roll in their order.

16. [*Appraisement and sale of poinded and sequestrated effects.*—The twentieth section of the first-recited Act and relative schedule shall be held as incorporated in the present Act: Provided always, that the words "poinding and sale" in said section and relative schedule shall, for the purposes of this Act, be read and construed to include poindings on which no sale has followed, as well as poindings which have been followed by sale of the poinded goods and effects.

17. [*Decrees, &c., not subject to review, except as hereby provided.*—No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever.

18. [*Fees to be taken.*—The following and no other or higher fees or dues of consignment shall be allowed to be taken for any matters done in any cause raised under the authority of this Act (except the fees of short-

hand writers, or of witnesses, or of reporters or commissioners appointed by the Sheriff under the eighth section hereof, which the Sheriff is hereby empowered to fix and decern for as he shall think just, and except also the expenses incurred in any appeal to the Court of Session, which shall be taxed and decerned for in common form) :—

*Sheriff-Clerk's Fees.*

Summons, including precept of arrestment, Two shillings.  
Each copy for service, Sixpence.  
Entering in procedure book, Sixpence.  
Warrant to cite witnesses and havers, One shilling.  
Certificate loosing arrestment, One shilling.  
Bond of caution, One shilling and sixpence.  
Second diligence against witnesses and havers, One shilling.  
Decree, including extract, if demanded, One shilling.  
Hearing after decree in absence, One shilling and sixpence.  
Indorsation of decree or warrant, and entering in book, One shilling.  
Receiving report of sequestration or poinding, and entering in book, One shilling.  
Receiving report of sale under sequestration or poinding, and entering in book, One shilling and sixpence.  
Transmitting process on appeal to Sheriff, Sixpence.  
Intimating judgment of Sheriff to each pursuer or defender, Sixpence.  
Transmitting process on appeal to the Court of Session, Sixpence.

*Officer's Fees, including Assistants or Witnesses.*

Citation of a party, or intimation of counter claim and execution, One shilling and sixpence.  
Citation of a witness or haver, and execution, Ninepence.  
Charging on decree, and returning execution of charge, One shilling and sixpence.  
Arrestment and returning execution thereof, One shilling and sixpence.  
Intimation of loosing arrestment, and execution thereof, One shilling and sixpence.  
Poinding, inventory, and report, including fee to appraisers serving copy and execution, Ten shillings.  
Sale and report, Ten shillings.  
Officer's travelling expenses, for each complete mile from the Cross or Tron, or other usual place of measurement in the town or place where the Court is held, where there is any such, or, if there be none such, then from the Court-house of such town or place to the place of execution or service, the distance travelled in returning after execution of the duty not to be reckoned, Eightpence.  
Assistants, each, *per* mile, in the same manner, Fourpence.

*Orier's Fee.*

For calling each cause, One penny, payable when summons issued.

*Procurator's Fees, applicable to Pursuer's or Defender's Procurator.***I.—Conduct of Cause.**

1. On decree in absence (absolvitor or condemnator) and procuring extract thereof.

- (1.) Where the sum concluded for (exclusive of expenses and dues of extract) does not exceed twenty-five pounds,—Seven shillings and sixpence.

- (2.) Where the sum concluded for (exclusive of expenses and dues of extract) exceeds twenty-five pounds, — Ten shillings.

2. On decree or judgment in a contested cause (whether the same shall have been appealed to the Sheriff or not), and procuring extract thereof.

- (1.) Where the sum concluded for (exclusive of expenses and dues of extract) exceeds twelve pounds and does not exceed twenty pounds,—Thirty shillings.

- (2.) Where the sum concluded for (exclusive as aforesaid) exceeds twenty pounds and does not exceed thirty pounds,—Forty shillings.

- (3.) Where the sum concluded for (exclusive as aforesaid) exceeds thirty pounds and does not exceed forty pounds,—Sixty shillings.

- (4.) Where the sum concluded for (exclusive as aforesaid) exceeds forty pounds and does not exceed fifty pounds,—Eighty shillings.

3. For decree in absence or *in foro* in an action of forthcoming, sequestration, or multiplepoinding, same as in an ordinary action.

- The above fees shall be exclusive of postages and actual outlays, but shall include the whole sum exigible, whether as between party and party or between client and agent, for taking instructions to prosecute or defend the action, instructing officers to cite parties or witnesses, or to arrest on the dependence, revising summons and citations and executions, precognosing witnesses, attending proofs and debates, writing and signing appeals, correspondence, and generally doing everything requisite for commencing and carrying on the action or the defence, until final judgment or decree in the Sheriff Court.

**II.—Execution of Diligence.**

1. Where poinding or imprisonment has followed on the decree, or where a sale has followed on a decree of sequestration, including instructing officer to arrest, charge, poind, sell, or imprison, revising his execu-

tions and reports, correspondence, receiving payment of sums in decree, and handing same over to creditor :

- (1.) Where the amount decerned for (exclusive of expenses and dues of extract) does not exceed twenty-five pounds, three per centum on the amount decerned for ; but no fee to be less than nine shillings.
  - (2.) Where the amount decerned for (exclusive of expenses and dues of extract) exceeds twenty-five pounds, two per centum on the amount decerned for ; but no fee to be less than fifteen shillings.
2. Where neither poiding nor sale nor imprisonment has followed, one-half of the above, both with respect to the maximum and minimum fees : Provided always, that where any cause shall have been conducted, under the fourth section hereof, partly by a solicitor-at-law, and partly by a writer to the signet or solicitor before the supreme Courts, the Sheriff shall determine what portion of said fees shall be payable to each of the agents or procurators who shall have been so engaged in the cause, and the Sheriff's determination shall be final.

19. [*Table of fees to be printed and hung up.*].—An exact copy of the immediately preceding section of this Act shall be at all times hung up in every Sheriff-Clerk's office and in every Sheriff Court place during the holding of any Court for the trial of causes under the authority of this Act ; and any Sheriff-Clerk at any time omitting to have such copy hung up in his office or in the Sheriff Court place as aforesaid, or not causing the roll of causes each Court-day to be publicly exhibited, or not causing the number and names of the parties in such roll to be called in their order as aforesaid, except with leave of the Sheriff, upon cause shown in open Court, shall be liable in a penalty not exceeding forty shillings, to be recovered at the instance of any person who shall prosecute for the same, and to be disposed of as the Sheriff shall direct : Provided always, that the Sheriff-Clerk shall be bound to account for the fees drawn by him under the authority of this Act in the same manner as he is now by law bound to account for the fees drawn by him under the authority of the first-recited Act, but no further or otherwise.

20. [*Court of Session to revise table of fees.*].—The Court of Session in Scotland shall be and is hereby authorised and empowered, after due inquiry, by Act or by Acts of Sederunt, from time to time to make such alterations by way of increase or decrease as to said Court shall seem needful on the fees and dues hereby authorised to be taken, or to frame a new table or tables of fees and dues that shall be allowed to be taken for matters done in contested causes raised under the authority of this Act, in place of the fees and dues hereinbefore specified ; and when any such alterations or any such new table shall be made, all the provisions herein contained relative to the fees specified in section eighteen hereof, shall be applicable to such

altered fees or dues, or such new table of fees and dues ; and the said Court shall have like powers to regulate the fees payable in appeals under this Act in the Court of Session.

21. [*Interpretation of terms.*].—In all cases in this Act, or in the schedules hereto annexed, the word “Sheriff” shall be held to include Sheriff-Depute and Steward-Depute and Sheriff-Substitute and Steward-Substitute ; the words “Sheriff-Substitute” to include Steward-Substitute ; the words “Sheriff Court” to include and apply to the Court of the Sheriff or Steward or their Substitutes ; the words “Sheriff-Clerk” to include Steward-Clerk and Depute Sheriff-Clerk and Depute Steward-Clerk ; the word “shire” or “county” to include stewartry ; the word “sheriffdom” to include and be included in the words “shire, county, or stewartry ;” the word “person” to extend to a partnership, body politic, corporate, or collegiate, as well as an individual ; the word “procurator” to include a writer to the signet or solicitor before the supreme Courts entitled to act as agent under the provisions of the fourth section of this Act : Provided always, that those words and expressions occurring in this clause to which more than one meaning is attached shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

22. [*Act not to affect recited Acts.*].—Nothing contained in this Act shall in any way affect the provisions of the recited Acts or either of them in regard to any proceedings which before the passing of this Act might competently take place under them.

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**SCHEDULE (B).**  
TRANSMISSION BOOK TO BE KEPT BY SHERIFF-CLERK.

| Names of Cause.<br>[As A. versus B.] | Date of Transmission to Sheriff-Substitute. | If Proof led, state whether before Sheriff, or Substitute, or Commissioner, and its Duration. | Date of Case being returned advised. | Date of Transmission to Sheriff. | Date of Case being returned advised. | Date of Intimation of Sheriff's Judgment. | Date of Transmission to Court of Session. | Date of Case being returned from Court of Session advised, or Appeal fallen from. | Remarks.* |
|--------------------------------------|---|---|--------------------------------------|----------------------------------|--------------------------------------|---|---|---|-----------|
|                                      |   |   |                                      |                                  |                                      |   |   |   |           |

\* NOTE.—Where cases have been longer than six days unadvised after transmission to the Sheriff, the reason to be stated in this column.  
Also the names of any commissioners to whom remits have been made to take proofs.

Also whether proof taken by Sheriff's or Commissioner's own hand, or by being dictated to a clerk or a shorthand writer.



## PART V. SUCCESSION.

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### CHAPTER I.—HERITABLE SUCCESSION.

31 & 32 Vict. c. 101.—An ACT to Consolidate the Statutes relating to the Constitution and Completion of Titles to Heritable Property in Scotland, and to make certain Changes in the Law of Scotland relating to Heritable Rights.—31st July, 1868.

1. [*Short title.*].—This Act may be cited for all purposes as “The Titles to Land Consolidation (*Scotland*) Act, 1868.”

27. [*Services to proceed by petition to the Sheriff.*].—From and after the commencement of this Act it shall not be competent to issue brieves from Chancery for the service of heirs, or for any person to obtain himself served heir by virtue of any such brieve, or otherwise than according to the provisions of this Act; and every person desirous of being served heir to a person deceased, whether in general or in special, and in whatsoever character, and whether the lands which belong to such person deceased were held by burgage tenure, or were not held by burgage tenure, shall present a petition of service to the Sheriff in manner hereinafter set forth.

28. [*Petition to be presented to the Sheriff of the county or to the Sheriff of Chancery.*].—In every case in which a general service only is intended to be carried through, such petition shall be presented to the Sheriff of the county within which the deceased had at the time of his death his ordinary or principal domicile, or, in the option of the petitioner, to the Sheriff of Chancery, and if the deceased had at the time of his death no domicile within *Scotland*, then in every such case to the Sheriff of Chancery; and in every case in which a special service is intended to be carried through, such petition shall be presented to the Sheriff within whose jurisdiction the lands or the burgh containing the lands in which the deceased person died

last vest and seised are situated, or, in the option of the petitioner, to the Sheriff of Chancery, and in the event of the lands being situated in more counties than one, or in more burghs than one, if such burghs are in different counties, then in every such case to the Sheriff of Chancery.

29. [*Nature and form of petition.*].—Every petition for service shall be subscribed by the petitioner, or by a mandatory specially authorised for the purpose, and shall be in the form, or as nearly as may be in the form, of one or other of the Schedules (P) and (Q) hereunto annexed, and shall, under the exceptions after-mentioned, set forth the particulars which, according to the law and practice existing prior to the fifteenth day of *November* one thousand eight hundred and forty-seven, had been in use to be set forth with reference to a service sought to be carried through in any claim presented to a jury summoned under a brieve of inquest, and shall pray the Sheriff to serve the petitioner accordingly : Provided always, that it shall not be necessary in such petition to set forth in any case the value of the lands either according to new or old extent, or the valued rent thereof, or of whom the lands are held, or by what service or tenure they are held, or in whose hands the same have been since the death of the ancestor, or whether or how long the same have been in non-entry, or that the petitioner is of lawful age, or that the ancestor died at the faith and peace of the Sovereign, but that in setting forth the death of the ancestor there shall also be set forth the date at or about which the said death took place, and in cases of general service, except as hereinafter provided, the county or place in which the deceased at the time of his death had his ordinary or principal domicile, and that in every case in which the petitioner claims to be served heir of provision, or of taillie and provision, whether in general or special, the deed or deeds under which he so claims shall be distinctly specified.

30. [*Services not to proceed till publication be made.*].—When any petition of service shall be presented to the Sheriff of any county the service shall not proceed until publication shall be made in such county, nor until the Sheriff-Clerk of the county shall have received from the Sheriff-Clerk of Chancery official notice that publication has been made edictally in *Edinburgh*; and when such petition shall be presented to the Sheriff of Chancery the service shall not proceed until publication shall have been made edictally in *Edinburgh*, nor until the Sheriff-Clerk of Chancery shall have received official notice that publication has been made in the county of the domicile of the party deceased, when such domicile was within *Scotland*, or the county or counties in which the lands are situated, as the case may be; and the edictal publication in *Edinburgh* shall be at the office of the keeper of edictal citations in the General Register Office, and in the same mode and form as in edictal citations; and in the county of the domicile, and in the county or counties where the lands are situated, by affixing on the doors of the Court-house, or in some conspicuous place of the Court or of the office of the Sheriff-Clerk of the county, as the Sheriff

may direct, a short abstract of the petition, and there shall be no further publication; and the form of such abstract, and the mode or form of the official notice of such publications, shall be those fixed and declared by the Court of Session, by Act of Sederunt, in virtue of the powers herein-after mentioned.

31. [*Caveats to be received.*—The Sheriff-Clerk shall be bound to receive any caveat against any petition of service to be presented to him, and on the receipt of the petition of service referred to in the caveat, or of any official notice of any such petition which may be communicated to such Sheriff-Clerk, such Sheriff-Clerk shall within twenty-four hours thereafter write and put into the post-office a notice of such petition, addressed either to the agent by whom or to the person on whose behalf the caveat is entered as may be desired in such caveat, and according to the name and address which shall be stated in such caveat, the Sheriff-Clerk receiving therefor a fee for his own use of such amount as shall be fixed by Act of Sederunt as aforesaid.

32. [*Petition of service to be equivalent to a brieve and claim.*—A petition of service so presented shall, after expiration of the period hereinafter mentioned, be equivalent to and have the full legal effect of a brieve of service duly executed, and of a claim duly presented to the inquest, according to the law and practice existing prior to the fifteenth day of *November*, one thousand eight hundred and forty-seven; and every petition of service, without further publication than is herein provided and has been or may be directed by Act of Sederunt, shall be held as duly published to all parties interested, and the decree to follow upon such petition shall not be questionable or reducible upon the ground of omission or inaccuracy in the observance by any officer or official person of any of the forms or proceedings herein prescribed, or which have been or shall be prescribed by Act of Sederunt made in relation to petitions of service.

33. [*Procedure before the Sheriff, and the effect of his judgment.*—In regard to all petitions of service presented to the Sheriff of Chancery or to the Sheriff of a county respectively where the deceased died in *Scotland*, no evidence shall be led and no decree pronounced thereon by such Sheriff until after the lapse of fifteen days from the date of the latest publication, or where publication is to be made in *Orkney* or *Shetland*, or the petition is presented to the Sheriff of *Orkney* or *Shetland*, until after the lapse of twenty days from such date; and in regard to all petitions of service to be presented to the Sheriff of Chancery where the deceased died abroad, no evidence shall be taken and no decree pronounced thereon by him until after the lapse of thirty days from such date; and it shall be lawful, after the lapse of the times respectively above mentioned, to the Sheriff to whom such petition of service shall have been presented, by himself, or by the provost or any of the bailies of any city or royal or parliamentary burgh, or by any Justice of the Peace for any part of the United Kingdom

wherever such Justice of the Peace may happen to be for the time, whether within the United Kingdom or abroad, or by any notary-public, all of whom are hereby authorised to act as commissioners of such Sheriff without special appointment, or by any commissioner whom such Sheriff may appoint, to receive all competent evidence, documentary and parole, and any parole evidence so received shall be taken down in writing according to the practice in the Sheriff Courts of *Scotland* existing prior to the first day of *November*, one thousand eight hundred and fifty-three, and a full and complete inventory of the documents produced shall be made out, and shall be certified by the Sheriff or his commissioner aforesaid; and on considering the said evidence the Sheriff shall, without the aid of a jury, pronounce decree, serving the petitioner in terms of the petition, in whole or in part, or refusing to serve the said petitioner, and dismissing the petition, in whole or in part, as shall be just; and the said decree shall be equivalent to and have the full legal effect of the verdict of the jury under the brieve of inquest according to the law and practice existing prior to the said fifteenth day of *November*, one thousand eight hundred and forty-seven.

34. [*Case where domicile of party is unknown.*].—Where a general service only is intended to be carried through by an heir it shall not be necessary, if the deceased died upwards of ten years prior to the date of presenting the petition for general service as heir to him, to state or prove the county within which the deceased had his ordinary or principal domicile at the time of his death, or that such domicile was furth of *Scotland*; but in such cases it shall be sufficient (so far as regards the domicile of the deceased) for the heir to state in his petition, and if required in the Court of service to make oath, that he is unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death: Provided always, that in every such case and in every case of general service where it is doubtful in what county the deceased had his ordinary or principal domicile, the petition for general service as heir to the deceased shall be dealt with, and all relative procedure shall be regulated in or as nearly as may be in the same manner as if it had been proved that the deceased had at the time of his death his ordinary or principal domicile furth of *Scotland*.

35. [*Competing petition may be presented, and Sheriff, after receiving evidence, give judgment.*].—It shall be lawful to any person who may conceive that he has a right to be served preferable to that of the person petitioning the Sheriff as aforesaid, also to present a petition of service to the Sheriff in manner and to the effect aforesaid, and the same shall be proceeded with in manner hereinbefore directed; and it shall be lawful to the Sheriff, if he shall see cause, at any time before pronouncing decree in the first petition, to sist procedure on the first petition in the meantime, or to conjoin the said petitions, and thereafter to proceed to receive evidence in manner hereinbefore directed, allowing each of the parties not only a proof in chief with reference to his own claim, but a conjunct probation

with reference to the claims of such other parties ; and the Sheriff shall, after receiving the evidence, pronounce decree on the said petitions, serving or refusing to serve as may be just, and shall at the same time dispose of the matter of expenses ; and when the accounts thereof shall be audited and taxed in manner after provided, such Sheriff shall decern for the same.

36. [*Recording and extract of judgment.*]—On the application of the petitioner in whose favour a decree shall have been pronounced by the Sheriff, the Sheriff-Clerk shall forthwith transmit to the office of the Director of Chancery the petition on which such decree was pronounced, together with such decree, the proof taken down in writing as aforesaid, and the inventories of written documents made up and certified as aforesaid, and also all other parts or steps of the process, excepting any original documents or extracts of recorded writs produced therewith, which, after decree is pronounced, shall be returned on demand to the parties producing the same ; and on the proceedings being so transmitted to Chancery, such decree shall be recorded by the Director of Chancery, or his depute, in the manner and form directed or approved of, or to be directed or approved of from time to time by the Lord Clerk Register ; and on such decree being so recorded, the Director of Chancery, or his depute, shall prepare an authenticated extract thereof, and where such decree shall have been pronounced by the Sheriff of Chancery, shall deliver such extract to the party or his agent, and in all other cases shall transmit such extract without delay, and without charge or expense against the party in respect of the transmission and retransmission, to the Sheriff-Clerk of the county to be by him delivered to the party or his agent in the Sheriff Court ; and such proceedings and decree shall, both prior and subsequent to the said transmission, be at all times patent and open to inspection in the office of the Sheriff-Clerk and of the Director of Chancery respectively ; and certified copies shall be given to any party demanding the same, on payment of such fees as shall be fixed by Act of Sederunt as aforesaid ; and in cases where an heir is served to an ancestor in several separate lands or estates under the same petition, it shall be competent for such heir to obtain separate extract decrees under the said petition applicable to one or more of such parcels of lands or separate estates, provided a prayer to that effect is inserted in the petition for service.

37. [*The extract decree to be equivalent to an extract retour.*]—The decree of service so recorded and extracted shall have the full legal effect of a service duly retoured to Chancery, and shall be equivalent to the retour of a service under the brieve of inquest according to the law and practice existing prior to the fifteenth day of *November*, one thousand eight hundred and forty-seven ; and the extract of such decree, or any second or later extract thereof, under the hand of the proper officer entitled to make such extracts for the time, shall be equivalent to and have the full legal effect of the certified extract of the retour formerly in use according to the law

and practice existing prior to the said fifteenth day of *November*, one thousand eight hundred and forty-seven; and the decree of service so recorded and extracted shall not be liable to challenge, nor be set aside, except by a process of reduction to be brought before the Court of Session as heretofore in use with regard to services duly returned to Chancery.

38. [*Transmission of records.*]

39. [*Clerks of Chancery to be remunerated for keeping register, &c., by Act of Sederunt.*]

40. [*No person entitled to oppose a service who could not appear against a brieve of inquest.*].—No person shall be entitled to appear and oppose a service proceeding before the Sheriff in terms of this Act who could not competently appear and oppose such service if the same were proceeding under the brieve of inquest according to the law and practice existing prior to the fifteenth day of *November*, one thousand eight hundred and forty-seven; and all objections shall be presented in writing, and shall forthwith be disposed of in a summary manner by the Sheriff, but without prejudice to the Sheriff, if he see cause, allowing parties to be heard *viva voce* thereon.

41. [*Appeal for jury trial.*].—In all cases in which competing petitions presented to the Sheriff in terms of the last-recited Act or of this Act have been or shall be conjoined as aforesaid, or in which any person has competently appeared or shall competently appear to oppose any petition of service presented to the Sheriff in terms of the said recited Act or of this Act, it shall be competent to any of the parties, at any time before proof is begun to be taken by the Sheriff in manner before provided, to remove the proceedings to the Court of Session, by a note of appeal in or as nearly as may be in the form of a note of appeal under the "Court of Session Act, 1868," which note of appeal shall be proceeded with in like manner with notes of appeal presented with a view to jury trial against judgments of the Sheriff Courts of *Scotland*, and such judgment shall be pronounced on the said note of appeal as shall be just; and in the event of it appearing proper that the cause should be tried by a jury, the same shall be tried according to the law and practice in trials by jury of causes in the Court of Session, and the jury shall be chosen and summoned in like manner as on such trials; and the verdict to be returned by the jury shall be equally final and conclusive with the verdicts returned in trials by jury in the said Court, but with all and the like remedies by bill of exceptions, motion for new trial, or otherwise, competent in regard to such verdicts: Provided always, that in every case in which the jury shall find a verdict, or in which the Court shall pronounce a judgment in favour of a party petitioning to be served, the Court shall, at the same time with applying such verdict, or pronouncing such judgment, remit to the Sheriff from whom the cause was appealed, or before whom such petitions or petition would have depended if the same had not been advocated or appealed before the commencement of this Act, with instructions to pro-

nounce a decree serving the said party in terms of this Act, which decree may thereafter be extracted, and the extract thereof recorded and given out in manner and to the effect before provided.

42. [*Where Sheriff refuses to serve petitioner, &c., judgment may be reviewed.*—In every case in which the Sheriff, acting under the said Act of the Tenth and Eleventh of Her Majesty Queen Victoria, chapter forty-seven, or under this Act, has pronounced or shall pronounce a decree refusing to serve a petitioner, or dismissing his petition, or repelling the objection of an opposing party, it shall be lawful to bring the said decree under review of the Court of Session by a note of appeal, in or as nearly as may be in the form of a note of appeal under the "Court of Session Act, 1868": Provided always, that such note shall be presented within fifteen, or, where the proceedings have been taken in the Courts of *Orkney* or *Shetland*, twenty days from the date of the said judgment; and that where the decree has been pronounced after opposition duly entered or in competition, such note shall be intimated to the opposite party, and such note shall be proceeded with in like manner with notes of appeal against final judgments of the Sheriff Courts; and it shall be competent to the Court of Session, if it shall appear necessary for the right determination of the cause, to allow further or additional evidence to be taken in any way or form in which evidence may be competently taken in ordinary civil causes depending before the said Court, or to appoint the cause, or special issues therein, to be tried by a jury, and such jury trial shall proceed in the same manner and to the like effect and with all and the like remedies as are before provided, and such judgment shall be pronounced on such note of appeal as shall be just: Provided always, that in every case in which the Sheriff has refused to serve but in which the Court of Session shall determine that the party ought to be served, a remit shall be made to the Sheriff from whom such petition has been or shall be appealed, or before whom the same, if not advocated or appealed before the commencement of this Act, would have depended, with instructions to pronounce a decree serving the said party in terms of this Act, which decree may be thereafter recorded and extracted in manner and to the effect before provided: Provided also, that nothing herein contained shall prejudice the right of any person whose petition of service shall be refused without any opposing or competing party having appeared and been heard on the merits of the competition, to present a new petition at any time thereafter, on the right of either party in any of the proceedings authorised in the Court of the Sheriff, by this Act or the said Act of the Tenth and Eleventh of Her Majesty, chapter forty-seven, to bring under challenge whatever decree may have been or may be pronounced therein by process of reduction before the Court of Session on any competent ground.

43. [*Procedure when a decree of service is brought under reduction. Effect of the decree of reduction.*—In every case in which a process of reduction of any decree of service pronounced by any Sheriff acting under the said last-

recited Act or this Act has been or shall be brought before the Court of Session, it shall be competent to the said Court, if it shall appear necessary for the right determination of the cause, either to allow further or additional evidence to be taken in any way or form in which evidence may be competently taken in ordinary civil causes depending before the said Court, or to appoint the cause, or special issues therein, to be tried by a jury ; and such jury trial shall proceed in the same manner, and to the like effect, and with all and the like remedies as are before provided in regard to jury trials under notes of appeal, and such judgment shall be pronounced in the said process as shall be just : Provided always, that wherever the decree of the Sheriff brought under reduction has proceeded on competing petitions conjoined as aforesaid, and the Court of Session shall determine that a different person shall be served from the person preferred by the Sheriff, a remit shall be made to the Sheriff acting under this Act before whom the said competing petitions depended, or to the Sheriff before whom the same would have depended if the said decree had not been pronounced before the commencement of this Act, with instructions to pronounce a decree serving such different person in terms of this Act, which decree may be thereafter recorded, and an extract thereof given out in manner and to the effect above provided ; and in any case of reduction of a service the judgment shall, unless and until reversed by the House of Lords on appeal, be conclusive, as between the parties to the suit, against the party whose service is reduced, and shall have the same effect as if the action had contained a conclusion of declarator that the party served was not entitled to be served in the character claimed, and judgment had been pronounced in terms of that conclusion.

44. [*Forms and effect of procedure in the Court of Session.*].—All proceedings authorised by the present Act to be taken in the Court of Session in reference to appeals from the Sheriff, or to reduction of decrees of service shall commence and be carried on in the same manner with proceedings of the same description in ordinary civil causes ; and all judgments to be pronounced by the Court of Session in such proceedings in terms of this Act, or in the corresponding proceedings in terms of the said last-recited Act, shall be equally final and conclusive as the judgments pronounced by the said Court in ordinary civil causes, and shall not be liable to review by reduction or otherwise, save and except to such extent and effect as judgments by the said Court in ordinary civil causes are so liable : Provided always that it shall be competent to appeal against the said judgments to the House of Lords in like manner as against judgments of the Court in ordinary civil causes aforesaid.

45. [*"Court of Session Act, 1868," to apply to appeals and reductions, &c., under this Act.*].—The whole provisions of the "Court of Session Act, 1868," shall, in so far as possible, apply to notes of appeal and processes of reduction under this Act, and to all advocations from the Sheriff and to all processes of reduction of decrees of service in dependence in the Court of



Session at the commencement of this Act, and to all advocations which may after the commencement of this Act come before the Inner House of the Court of Session by report or reclaiming note from any Lord Ordinary ; provided always, that the advocations depending before the Outer House of said Court at the commencement of this Act shall be disposed of in the Outer House according to the law and practice existing prior to the commencement of the said " Court of Session Act, 1868."

46. [*A decree of special service, besides operating as a retour, shall have the operation and effect of a disposition from the deceased to his heirs and assignees*].

47. [*A special service not to infer a general representation, either active or passive*].

48. [*Petitioner for special service may petition for general service.*].—In any petition for special service, in whatever character, it shall be competent for the petitioner to pray for general service in the same character as that in which special service is sought, and decree may be pronounced in terms of such prayer as well as for special service ; and no further notice or publication of the petition shall in such case be necessary than is hereby required for such petition of special service.

49. [*A general service may be applied for and obtained to a limited effect by annexing a specification, and it shall infer only a limited passive representation.*].—It shall be lawful for any person presenting a petition for general service to a deceased person to state in such petition, in the form or as nearly as may be in the form No. 1 of Schedule (R) hereunto annexed, that he desires the effect thereof to be limited to certain lands which belonged to the deceased, and which shall be embraced in a particular specification thereof, to be annexed to such petition for general service, which specification shall be in the form or as nearly as may be in the form No. 2 of the said Schedule (R), and shall be subscribed by the petitioner or his mandatory ; and in preparing an abstract of such petition for insertion in the minute book of the Court in which it shall be presented, and for publication, it shall be described as a petition for general service with specification annexed ; and the Sheriff to whom such petition for general service with specification annexed shall be presented shall, in pronouncing decree of service on such petition, make reference to the specification annexed thereto, and shall limit such decree of service to the lands described in the said specification, and the effect of such decree shall accordingly be taken and held in law to be so limited ; and a copy of such specification shall be embodied in the extract of the said decree, and recorded as part thereof ; and every such decree of general service, obtained in virtue of the said last-recited Act or of this Act, with specification annexed, shall infer only a limited passive representation of the deceased ; and the person thereby served as heir shall be liable in respect of such service for the deceased's debts and deeds only to the extent or value of the lands contained in the relative specification.

50. [*Jurisdiction of the Sheriff of Chancery.*—The Sheriff of Chancery appointed or to be appointed in virtue of this Act shall have and possess such and the like authority and jurisdiction to entertain, try, and adjudicate, but in the manner prescribed and directed by this Act, all questions of and relating to the service of heirs, as the Sheriff of Chancery appointed in virtue of the said recited Act Tenth and Eleventh of the reign of her present Majesty, chapter forty-seven, or any Sheriff or Judge Ordinary, now has and possesses in any case competent before such Sheriff or Judge Ordinary, or in any case now or formerly competent before the Sheriff of *Edinburgh* acting on special commission; and such Sheriff of Chancery shall hold his Court in any Court-room within the Parliament or new Session-house of *Edinburgh* which has been or may be assigned by the Lords of Session for that purpose, or in any other place which may be so assigned.

51. [*Power to the Court of Session to pass Acts of Sederunt.*]\*

52. [*Appointment of Sheriff of Chancery.*]

53. [*Agents may practise before Sheriff Courts.*].—It shall be lawful and competent for agents qualified to practise before the Court of Session or before any Sheriff Court, to practise before the Sheriff of Chancery as well as in the ordinary Sheriff Courts in petition of service.

54. [*Salaries of Sheriff of Chancery and Sheriff-Clerk of Chancery.*]

55. [*Salary to be regulated by the Commissioners of the Treasury on vacancy.*]

56. [*Compensation already awarded not to be affected.*]

57. [*Compensation to be paid.*]

58. [*Provisions as to depending petitions for service.*]†

## SCHEDULES referred to in the foregoing Act.

### SCHEDULE (P).

#### *Form of Petition of General Service.*

Unto the Honourable the Sheriff of [*specify the county, or say, "of Chancery"*], the petition of *A B* [*here name and design the petitioner*],

Humbly sheweth,

That the late *C D* [*here name and design the ancestor to whom service is sought*] died on or about the            day of           , and had at the time of his death his ordinary or principal domicile in the county of           , [*or furth of Scotland, as the case may be. In cases where the deceased died upwards of ten years before the date of the petition, and the petitioner cannot ascertain the place of the domicile, say, that the late C D*

\* By § 162, the Acts of Sederunt passed under the previous Service of Heirs Act (1847) are kept in force until the Court of Session shall pass others.

† Petitions depending under the former Act are to be taken up and carried on as if they had been presented under this Act.

(*here name and design the ancestor to whom service is sought*) died on or about the            day of            , but the petitioner is unable to prove at what place the deceased had his ordinary or principal domicile at the time of his death.]

That the petitioner is the eldest son [*or state what other relationship or character of heir the petitioner bears*] and nearest lawful heir in general of the said *C D*. [*If the service is as heir of provision, say, that the petitioner is the eldest son (or state what other relationship or character of heir the petitioner bears) and nearest lawful heir of provision in general of the said C D under and by virtue of a deed (specify the deed of provision) executed by E F, dated the            day of            , or otherwise describe the deed so as to clearly identify it; or, if the service is as heir of tailzie, say that the petitioner is the eldest son (or state what other relationship, &c., the petitioner bears) and nearest and lawful heir of tailzie and provision in general of the said C D, under and by virtue of a disposition and deed of entail granted by E F, dated the            day of            , and recorded in the Register of Tailzies the            day of            , whereby the said E F conveyed the lands of M to and in favour of J K (here set forth the destination, or such part thereof as may be deemed necessary, or say, and the other heirs therein mentioned; but always with and under the conditions, provisions, and prohibitory, irritant, and resolute clauses or clause authorising registration in the Register of Tailzies, as the case may be) contained in the said recorded deed of entail, and here referred to as at length set forth therein.*]

May it therefore please your Lordship to serve the petitioner nearest and lawful heir in general to the said *C D* [*or whatever other character of heir is sought to be established here set it forth.*]

According to justice, &c.

[*Signed by the petitioner or his mandatory.*]

#### SCHEDULE (Q).

##### *Form of Petition of Special Service.*

Unto the Honourable the Sheriff of [*specify the county, or say "of Chancery"*], the petition of *A B* [*here name and design the petitioner*],

Humbly sheweth,

That the late *C D* [*here name and design the ancestor*] died on or about the            day of            [*state the month and the year at full length*], last vest and seised in [*here describe or refer as in Schedule (E)\* or*

#### \* SCHEDULE (E).

*Cause of reference to Particular Description contained in a prior Deed.*

[*After giving some leading name or names or some other distinctive descrip-*

*tion of the lands as contained in the titles thereof, and the name of the county, and, in the case of lands held by burgage tenure, the name of the burgh and county in which the lands lie, add] being the lands [or subjects] particularly de-*

*Schedule (G)\* to the lands with reference to which the service is sought*] conform to disposition [or other deed or conveyance] dated the day of , and along with warrant of registration thereon, on behalf of the said *C D*, recorded in the Register of Sasines (specify register) on , the day of [or conform to disposition, or whatever else was the deed or conveyance on which the ancestor's infestment proceeded, here specify it, dated the day of , and to instrument of sasine following thereon, recorded in the Register of Sasines (specify register) on , the day of , or otherwise specify the title of deceased as recorded in the Register of Sasines]; and when the lands are held under a deed of entail, here insert the conditions, &c., at full length, or refer to them in or as nearly as may be in the form of Schedule (C)† or, if desired, refer to them as follows,

scribed in the [here specify a prior deed or instrument containing the particular description of the lands or subjects] recorded [specify Register of Sasines, or if the deed or instrument as recorded has been previously referred to say, in the said deed (or instrument) recorded as aforesaid] on the day of , in the year .

[If part only of lands is conveyed, describe such part, and add, being part of the lands particularly described, &c.; or thus, being the lands (or subjects) as particularly described, &c., with the exception of, and describe the part excepted.]

#### \* SCHEDULE (G).

*Clause of reference to Conveyance containing general Designation of Lands.*

[After giving the general name or names of the lands and the name of county, or burgh and county, as the case may be, add] as particularly described in the disposition [or other deed, as the case may be] granted by *C D*, and bearing date [here insert date] and recorded in the [specify the Register of Sasines on the day of in the year , and in which the lands hereby conveyed are declared to be designed and known by the said name of [here insert name], [or "as particularly described in the instrument (specify instrument) recorded, &c., and in which the lands hereby conveyed are declared," &c.] [If part only of lands is conveyed, then follow form for similar case given in Schedule (B).]

#### † SCHEDULE (C).

*Clause of reference to Destinations and Conditions of Entail, &c.*

[After inserting such part of the destination as may be thought necessary, add] and to the other heirs specified in a disposition and deed of entail [or as the case may be] of the said lands executed by the deceased *E F*, dated the day of , in the year , and recorded in the Register of Tailzies on the day of , in the year [or in the said disposition and deed of entail dated and recorded as aforesaid, or in a deed or instrument (specify the deed or conveyance)] recorded [specify Register of Sasines] upon the day of , in the year .

[And after the description of the lands insert] but always with and under the conditions, provisions, and prohibitory, irritant, and resolute clauses [or clause authorising registration in the Register of Tailzies, as the case may be], contained in the said disposition and deed of entail, dated and recorded as aforesaid [or in (specify deed or conveyance) recorded in (specify Register of Sasines) upon the day of , in the year ].

[And in subsequent clauses in which it is usual or requisite to refer again to the conditions of the entail, &c., the reference may be made thus:] but always with and under the conditions, provisions, and prohibitory, irritant, and resolute clauses [or clause authoris-

but always with and under the conditions, provisions, and prohibitory, irritant, and resolute clauses [or clause authorising registration in the Register of Tailzies, *as the case may be*], contained in a deed of entail granted by *G H* [*here name and design the grantor*], dated the      day of      , in favour of *I K* [*here set forth the destination, or such part thereof as may be deemed necessary, or say, and the heirs therein specified*], and which conditions, provisions, and prohibitory, irritant, and resolute clauses [or clause authorising registration in the Register of Tailzies, *as the case may be*], are herein referred to as at length set forth in the said deed of entail, which is recorded in the Register of Tailzies on the      day of      [or as at length set forth in the above-mentioned recorded disposition or other deed or conveyance in favour of the deceased, or as at length set forth in any other recorded deed or conveyance. And in every case where there are any real burdens, conditions, provisions, or limitations proper to be inserted or referred to, insert them here, or refer to them in or as nearly as may be in the form of Schedule (D).]\*

That the petitioner is the eldest son [or state what other relationship or character the petitioner bears] and nearest lawful heir in special of the said *C D* in the lands and others foresaid. [If the service is as heir of provision, say, that the petitioner is the eldest son (or state what other relationship or character the petitioner bears) and nearest lawful heir of provision in special of the said *C D* in the lands and others foresaid, under and by virtue of a deed [or other conveyance] executed by *E F*, dated [*here describe the deed or conveyance by date, or otherwise describe it so as clearly to identify it.*] [And if the service is as heir of entail, say, that the petitioner is the eldest son (or, state what other relationship or character the petitioner bears), and nearest and lawful heir of tailzie and provision in special of the said *C D* in the lands and others foresaid under and by virtue of the said deed of entail.]

[If it is wished to embrace a service in general in the same character as that in which special service is sought, say, That the petitioner is likewise heir in

ing registration in the Register of Tailzies, *as the case may be*] before referred to.

#### \* SCHEDULE (D).

Clause of reference to Real Burdens, Conditions, &c., in Investiture.

[After the description of the lands, instead of inserting the burdens, &c., at length, these may be referred to as follows, viz.:] but always with and under the real burdens, conditions, provisions, and limitations [or such of these as may apply or have reference to the case] specified in a deed [or instrument, here specify a deed or conveyance in which the burdens, &c., were

first inserted, or any subsequent deed or conveyance in which they are inserted, forming part of the progress of the titles to the lands] recorded [specify Register of Sasines, or, if the deed or conveyance as recorded has been previously referred to, say, in the said deed (or instrument) recorded as aforesaid] on the      day of      , in the year      .

[And in subsequent clauses in which it is requisite or usual to refer again to the burdens, &c., the reference may be made thus:] but always with and under the real burdens, conditions, provisions, and limitations [or such of these as may apply or have reference to the case] before referred to.

general, or of provision in general, or of tailzie and provision in general, or otherwise, as the case may be, of the said *C D*.]

May it therefore please your Lordship to serve the petitioner nearest and lawful heir [or heir of provision, or heir of tailzie and provision, or otherwise, as the case may be] in special of the said deceased *C D* in the lands and others above described [and where a general service is wished, add, and likewise nearest and lawful heir (or heir of provision, or heir of tailzie and provision) in general of the said *C D*, or whatever else is the character of heir sought to be established here set it forth as above]. And where the service is of heir of tailzie and provision, say here, but always with and under the conditions, provisions, prohibitory, irritant, and resolute clauses [or clause authorising registration in the register of tailzies] above referred to [or above written]; and where there are real burdens, &c., say, but always with and under the real burdens, &c., above referred to [or above written]. And where there are several parcels of land or separate estates, here add, if desired, and to grant warrant to the Director of Chancery to issue separate extract decrees applicable to one or more of such parcels of land or separate estates.

According to justice, &c.

[Signed by the petitioner or his mandatory.]

#### SCHEDULE (R).

*Forms for a General Service where it is to be limited in its effects by a specification annexed.*

##### No. 1.

The petition will be in the form of Schedule (P), adding at the close of the statement of the petitioner, but the petitioner desires that his general service shall be limited to the contents of the specification annexed; and adding at the close of the prayer of petition, but under limitation as aforesaid to the contents of the specification annexed.

##### No. 2.

Specification of the lands and other heritages which belonged to the deceased *C D* referred to in the petition for general service presented to the Sheriff of \_\_\_\_\_, by *A B* as heir of \_\_\_\_\_ in general to the said deceased *C D*.

[Here insert a description of the lands and other heritages intended to be

*included in the service, distinguishing each separate property or heritage if there are more than one, by a separate number.]*

*[Signed by the petitioner or his mandatory.]*

**ACT OF SEDERUNT** to regulate Publication in Services, and the Fees of Sheriff-Clerks therein.—Edinburgh, 14th July, 1847.—[Made permanent by Act of Sederunt, 17th November, 1849.]

THE Lords of Council and Session, in pursuance of the powers vested in them by the Act of Parliament passed in the 10th and 11th year of her present Majesty's reign, chapter 47, intituled "An Act to amend the Law and Practice in Scotland as to the Service of Heirs," declare,—

I. That the abstracts to be published in regard to general and special services before the Sheriffs of counties and the Sheriff of Chancery, shall be in the forms, or as nearly as may be in the forms, following, according to the circumstances of the case :—

1. *Abstract of Petition for General Service, when presented to the Sheriff of a County.*

Petition for general service to the Sheriff of [*here name the county*], by *A B* [*here name and design the petitioner*], as [*here mention the relationship and character as stated in the petition*] in general to the deceased *C D* [*here name and design the deceased*], whose ordinary or principal domicile at the period of his death was in the said county.

Presented on the [*here mention the date of presenting the petition*].

2. *Abstract of a Petition for Special Service, when presented to the Sheriff of a County.*

Petition for special service to the Sheriff [*here name the county*], by *A B* [*here name and design the petitioner*], as [*here mention the relationship and character as stated in the petition*] in special to the deceased *C D* [*here name and assign the deceased*], in the lands of [*here mention the general designation or leading name, and, if there be more parcels than one, the leading names of the lands described in the petition*].

Presented on the [*here mention the date of presenting the petition*].

3. *Abstract of a Petition for General Service, when presented to the Sheriff of Chancery.*

Petition for general service to the Sheriff of Chancery by *A B* [*here name and design the petitioner*], as [*here mention the relationship and character as*

*stated in the petition*] in general to the deceased *C D* [*here name and design the deceased*] whose ordinary or principal domicile, at the period of his death was in the county of [*here name it, or who died domiciled furth of Scotland*].

Presented on the [*here mention the date of presenting the petition*].

4. *Abstract of a Petition for Special Service, when presented to the Sheriff of Chancery.*

Petition for special service to the Sheriff of Chancery by *A B* [*here name and design the petitioner*], as [*here mention the relationship and character as stated in the petition*] in special to the deceased *C D* [*here name and design the deceased*], in the lands of [*here mention the general designation or leading name, and, if there be more parcels than one, the leading names of the lands described in the petition*] situate in the county of [*here name it, or if in more counties than one, say, in the counties of* and ].

Presented on the [*here mention the date of presenting the petition*].

II. That in making edictal publication of all services, an abstract, in the form above prescribed, as suitable to the case, shall be left by the Sheriff-Clerk of Chancery at the office of the Keeper of the Register of Edictal Citations, and shall be entered by him in a separate book, to be kept by him for that purpose, and shall be printed and published weekly in the printed record

of edictal citations, which, so far as regards the purposes of this enactment, shall be a weekly publication.

III. That the official notices of publication shall be required and given by the several Sheriff-Clerks, whether of counties or of Chancery, in the following forms, or as nearly as may be in these forms :—

1. *Requisition from the Sheriff-Clerk of a County to the Sheriff-Clerk of Chancery.*

[*Place and date.*]

SIR,—I request you to publish edictally the service of which an abstract is subjoined, and to send me immediate notice of your having done so. I am, &c.

[*Signature and designation.*]

[*Here copy the abstract.*]

2. *Answer by the Sheriff-Clerk of Chancery to the above.*

Edinburgh,

[*Date.*]

SIR,—I have received your requisition of the [*date*], which I return enclosed, with a certificate of publication annexed to it. I am, &c.

[*Signature and designation.*]

3. *Certificate of Publication to be so annexed by the Sheriff-Clerk of Chancery.*

Edinburgh,

[*Date.*]

I hereby certify that the before-written abstract was edictally published by me this day.

[*Signature and designation.*]



4. *Requisition from the Sheriff-Clerk of Chancery to the Sheriff-Clerk of a County.*

Edinburgh,

[Date.]

SIR,—I request you to publish in your county the service of which an abstract is subjoined, and to send me immediate notice of your having done so. I am, &c.

[Signature and designation.]

[Here copy the abstract.]

5. *Answer by the Sheriff-Clerk of the County to the above.*

[Place and date.]

SIR,—I have received your requisition of the [date], which I return enclosed, with a certificate of publication annexed to it. I am, &c.

[Signature and designation.]

6. *Certificate of Publication to be so annexed by the Sheriff-Clerk of the County.*

[Place and date.]

I hereby certify that the before-written abstract was duly published in this county by me this day.

[Signature and designation.]

IV. That the requisition for publication above prescribed shall be made by the Sheriff-Clerk, whether of a county or of chancery, with whom the petition for service has been lodged, without delay after his receiving such petition, in a post-paid letter; and the publication shall be made, and the prescribed answer to such requisition shall be returned, likewise in a post-paid letter without delay.

V. That when a petition of service is lodged with the Sheriff-Clerk of any county he shall receive from the party presenting the same the fee payable to the Sheriff-Clerk of Chancery for the edictal publication thereof, and shall, once in each year, at a period and in the manner to be appointed under proper authority, make due accounting to the Sheriff-Clerk of Chancery therefor. And when a petition of service shall be lodged with the Sheriff-Clerk of Chancery, he shall receive from the party presenting the same the fee

payable to the Sheriff-Clerk of the county in which such service has to be published for such publication thereof, and shall once in each year, at a period and in the manner to be appointed under proper authority, make due accounting to the Sheriff-Clerk of such county therefor.

VI. And to obviate doubts in regard to the form of extracts of decrees of general service, which, in terms of the 25th section of the said statute, are limited to certain lands and heritages embraced in a particular specification thereof annexed to the petition for service, it is declared that such specification shall be signed by the Sheriff-Clerk, but it shall not be necessary that the copy thereof to be embodied in such extracts shall be so signed.

VII. And until otherwise ordered by Act of Sederunt, the following fees shall be exigible by Sheriff-Clerks for the business done under the foresaid Act of Parliament.

## TABLE OF FEES.

*Fees to be paid in the Office of Chancery.*

|  |     |    |   |
|--|-----|----|---|
| For extracting decrees of service (including recording), each sheet of said extract, or part of a sheet, of 300 words,     | *£0 | 2  | 0 |
| For certified copies of proceedings in services, when required by the party, each sheet, or part of a sheet, of 300 words, | 0   | 2  | 0 |
| For inspection of each book of record, having a corresponding index of reference,  | 0   | 2  | 6 |
| For inspection of the proceedings in a service,  | 0   | 2  | 6 |
| For searches in the indices in the books of record :—  |     |    |   |
| (1.) For any period not exceeding one year, a fee of   | 0   | 2  | 6 |
| (2.) For any period of from one year to ten years inclusive, a fee of  | 0   | 5  | 0 |
| (3.) For any longer period,  | 0   | 10 | 0 |
| For transmitting the proceedings in a service on the warrant of the Court of Session,                                      | 0   | 7  | 6 |
| For each attendance to exhibit a book or books of record, where the same may be lawfully required, a fee of                | 0   | 5  | 0 |

*Fees to be paid to the Sheriff-Clerk of Chancery, and Sheriff-Clerks of Counties.*

|  |   |    |   |
|--|---|----|---|
| Fee to be received on presenting the petition, whether of general or special service, whereof one-half to be retained by the Sheriff-Clerk receiving it, and the other half accounted for by him to the Sheriff-Clerk who assists in the publication of the petition, and to cover correspondence, framing of extracts, publication, and postages, | 0 | 10 | 0 |
|--|---|----|---|

*In General Services.*

|  |   |    |   |
|--|---|----|---|
| For attending at service, and framing and recording minutes,   | 0 | 3  | 6 |
| In litigated cases, the clerk or assistant-clerk to be paid for writing the proof, at the rate, per sheet of 300 words, of | 0 | 0  | 6 |
| For general trouble connected with the service,  | 0 | 10 | 0 |
| For writing decree of service,   | 0 | 2  | 6 |

*In Special Services.*

|  |   |   |   |
|--|---|---|---|
| For framing and recording minutes (including attendance at the service)— |   |   |   |
| For the first sheet, of 300 words,                                       | 0 | 3 | 6 |
| Every following sheet,   | 0 | 2 | 0 |

\* Raised to 3s. 6d. by Act of Sederunt, 17th November, 1849. In each service carried through before the

Sheriff of Chancery, the macer (under the same Act of Sederunt) gets a fee of 2s.

|  |         |
|--|---------|
| For general trouble connected with the service, . . .  | £0 15 0 |
| For writing decree of service, . . .   | 0 5 0   |
| In litigated cases, the clerk or assistant-clerk to be paid for writing the proof, at the rate, per sheet of 300 words, of . . . | 0 0 6   |

NOTE.—In all cases, the additional procedure occurring when the service is opposed, to be paid for by the parties according to the rates chargeable by the respective Sheriff-Clerks in ordinary business; and in the case of the Sheriff-Clerk of Chancery, according to the rates chargeable by the Sheriff-Clerk of Edinburgh, as regulated by the Act 1 & 2 Vict. cap. 119.

*Caveats.*

|   |       |
|---|-------|
| For each caveat (to be effectual for one year), the Sheriff-Clerk to receive for his own use, in all cases, . . . | 0 2 6 |
|---|-------|

37. & 38 Vict. c. 94.—An ACT to amend the law relating to Land Rights and Conveyancing, and to facilitate the Transfer of Land in Scotland.—13th August, 1874.

9. [*Estates to vest in heirs without service.*].—A personal right to every estate in land descendable to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by survivorship of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date, and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance, according to the existing law and practice.

10. [*Completion of title when deceased heir not served.*].—A title of an heir to, or disponent of, a proprietor of any lands who was neither infeft nor served, but vested only with a personal right to such lands, by virtue of this Act, or of any person acquiring right from such heir or disponent, may be made up in like manner as if the person making up a title had held a disposition from the proprietor last infeft in the lands in favour of his immediate successor therein, and a disposition and assignation from each heir or disponent, if any, intervening between such immediate successor and the person so making up a title in favour of his immediate successor therein; and such title may be made up in manner following, viz. :—

The heir or disponent or other successor making up such title shall present to the Sheriff of Chancery, or to the Sheriff of the county where the lands are situated, a petition which may embrace several separate lands or estates,

and may be in the form of Schedule (E) hereto annexed, or as nearly in that form as the circumstances in each particular case will permit, setting forth the name of the proprietor last infest, a description of the lands, or a valid reference thereto, and the names and, so far as known, the designations of every proprietor having only a personal right therein, whether by succession, bequest, gift, or conveyance, who has intervened between the proprietor last infest and the petitioner, and also setting forth the petitioner's own right to the said lands; and on the decree pronounced on said petition finding the facts therein set forth proved, and that the petitioner is entitled to be infest in the said lands, being extracted in one or several extracts, and on such extract decree or decrees, as the case may be, being recorded in the appropriate register of sasines, the petitioner shall be held to be duly infest in the said lands contained in the extract or extracts so recorded.

[*Petition to be proceeded with as if it were a petition for special service.*].—Such petition shall be presented, published, and carried through in all respects as if the same were a petition for special service under the now existing law; and the extract decree or decrees on such petition, as the case may be, shall be equivalent to a decree of special service, and when duly recorded as aforesaid in the appropriate register of sasines, shall have the same effect as regards the lands therein contained as an extract decree of special service duly recorded under the now existing law.

11. [*Error in character in which heir entered not to affect entry.*].—Notwithstanding any existing law or practice it shall be no objection to any precept or writ from Chancery or of *clare constat*, or to any decree of service whether general or special, or to any writ of acknowledgment, whether obtained before or after the commencement of this Act, or to any other decree, or to any petition, that the character in which an heir is or may have been entitled to succeed is erroneously stated therein; provided such heir was in truth entitled to succeed as heir to the lands specified in the precept, writ, decree, or petition.

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#### SCHEDULE (E).

*Form of Petition for completing a title to lands where a Proprietor or Proprietors having only a Personal Right have intervened between the Proprietor last infest and the Petitioner.*

Unto the Honourable the Sheriff of [*specify the county, or say "of Chancery"*].

The Petition of *A B* of *G*.

Humbly sheweth,

That the late *C D* of *G* died last vest and seised in all and whole [*describe or refer to the lands as the same are described or referred to in the recorded*

deed or instrument in favour of the person who was last vest and seised in the lands, or refer to them as described in some other recorded deed or instrument], conform to instrument of sasine [or other recorded deed or instrument, as the case may be], recorded in the [specify the Register of Sasines and date of recording, and where there are any real burdens, conditions, or qualifications, here specify or refer to them, or where the lands are held under entail, here specify the conditions of the entail, or refer to them as contained in the entail as recorded in the Register of Tailzies, or if it is not so recorded, in the entail or other deed or instrument recorded in the Register of Sasines.]

Or, that *M N* of *Y* was last vest and seised in all and whole [describe or refer and specify title and date of recording, &c. as above]. That the said *M N* by disposition dated [specify date] conveyed the said lands to *C D* of *G*. That the said *C D* died never having been infeft in the said lands.

That *E F*, eldest son of the said *C D* [or otherwise as the case may be], is his heir in the said lands, but has only a personal right thereto.

That the said *E F*, by disposition dated [specify date], conveyed the said lands to the petitioner.

Or, that upon the death of the said *C D* he was succeeded by *E F*, his eldest son [or otherwise as the case may be], as his heir in the said lands. That the said *E F* died unserved and uninfeft [or that the said *E F* expedie a special service as heir of the said *C D*], conform to decree of the Sheriff of Chancery [or as the case may be] in his favour as heir foresaid, dated [insert date], but died without being infeft thereon, or, that the said *E F* expedie a general service as heir of the said *C D*, conform to decree [specify the decree], but made up no further title.

Or otherwise specify the nature of the right in the person of *E F*.

That the said *E F* disposed the said lands or conveyed his whole estate heritable and moveable, to *G H*, conform to [describe title by name and date, and where there are any real burdens, conditions or qualifications, specify or refer to them].

That the said *G H* also died, having only a personal right to the said lands, and was succeeded by his eldest son *K L*, his nearest and lawful heir in the said lands [or otherwise as the case may be].

That the said *K L* died unserved, and having only a personal right to the said lands [if the petitioner is his heir, say], and was succeeded by the petitioner the said *A B*, his eldest son [or otherwise as the case may be], and nearest and lawful heir in the said lands [or when the petitioner is a disponee or has otherwise acquired right from *K L*, say]. That the said *K L* disposed the said lands [or conveyed his whole estate, heritable and moveable] [or otherwise, as the case may be], to the petitioner the said *A B*, conform to disposition, or general disposition [or otherwise, as the case may be], dated [specify date] granted in his favour by the said *K L*, who died unserved and having only a personal right to the said lands; and if the deed be granted under any real burden, or condition, or qualification, add] but always under the real burden, &c.; [and if the deed be granted in trust or for specific pur-

*poss, add*] but always in trust or for the uses, ends, and purposes mentioned in the said general disposition [*or otherwise as the case may be*].

May it therefore please your Lordship to find the facts above set forth proved, and that the petitioner is entitled to procure himself infeft in the foresaid lands, in terms of "The Conveyancing (Scotland) Act, 1874," and to decern.

According to justice, &c.

[*Signed by the petitioner or his mandatory.*]

NOTE.—If any of the transmissions have been judicial, as by adjudication, act, and warrant of Court, or otherwise, or if by any of the transmissions a part or parts only of the lands are transferred, the necessary alterations may be made on the form of a petition.

## CHAPTER II.—MOVEABLE SUCCESSION.

### 4 Geo. IV. c. 98.—An ACT for the better granting of Confirmations in Scotland.—19th July, 1823.

1. [*Right to confirmation to transmit to representatives.*].—Whereas it is expedient that provision should be made for the better granting of confirmations, in certain cases, in *Scotland*; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate.

2. [*Court to regulate caution to be found.*].—And be it further enacted, That from and after the first day of *January*, one thousand eight hundred and twenty-four, caution shall not be required to be found by executors-nominate, and in all other cases the Court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed.

3. [*Partial confirmations to cease.*].—And be it further enacted, That from and after the first day of *January*, one thousand eight hundred and twenty-four, every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath: Provided always, that it shall and may be lawful to eik to such

confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered shall be added upon oath as aforesaid : Provided nevertheless, that nothing herein contained shall affect or alter the provision made with respect to special assignations by an Act of the *Scottish* Parliament, made in the year one thousand six hundred and ninety, intituled, Act anent the Confirmation of Testaments,

4. [*In cases of executor's creditor confirmation to be granted.*].—Provided further, and be it enacted, That in the case of confirmation by executor's creditor, such confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath : Provided always, that notice of every application for confirmation by any executor's creditor shall be inserted in the *Edinburgh Gazette*, at least once, immediately after such application shall be made ; in evidence whereof, a copy of the gazette in which such notice shall have been inserted shall be produced in Court before any such confirmation shall be further proceeded in.

11 *Geo. IV. & 1 Will. IV. c. 69.*—An ACT for uniting the benefits of Jury Trial in Civil Causes with the ordinary jurisdiction of the Court of Session, and for making certain other alterations and reductions in the Judicial Establishments of *Scotland*.—23rd July, 1830.

31. [*Jurisdiction of Commissary Court of Edinburgh restricted.*].—And be it enacted, that the Commissary Court of *Edinburgh* shall possess and exercise the same and no other jurisdiction in the sheriffdom of *Edinburgh* than that possessed and exercised by Sheriffs being commissaries in other sheriffdoms of *Scotland* ; and that any jurisdiction of a more extensive nature heretofore possessed or exercised by the Commissary Court of *Edinburgh* shall entirely cease, save and except such as may regard the granting of confirmation of testaments of persons dying furth of *Scotland*, having personal property in *Scotland*, which jurisdiction is hereby reserved to the said

21 & 22 *Geo. IV. c. 56.*—An ACT to amend the Law relating to the confirmation of Executors in *Scotland*, and to extend over the United Kingdom the effect of such Confirmation of Executors and Grants of Probate and Administration.

WHEREAS it is expedient to amend the law relating to the confirmation of Executors in *Scotland*, and to extend over the United Kingdom the effect of

such confirmation, and of grants of probate and administration ; Be it enacted :—

1. [*Practice of raising edicts of executry to cease.*—From and after the twelfth day of *November*, one thousand eight hundred and fifty-eight, the practice of raising edicts of executry before the Commissary Courts in *Scotland*, for the decerniture of executors to deceased persons, shall cease, and it shall not be competent to any person to obtain himself decerned executor in virtue of any such edict raised subsequently to the date aforesaid.

2. [*Petition to Commissary to be substituted. Form of petition as in Schedule (A).*—From and after the date aforesaid every person desirous of being decerned executor of a deceased person as disponee, next-of-kin, creditor, or in any other character whatsoever now competent, or of having some other person, possessed of such character, decerned executor to a deceased person, shall, instead of applying, as heretofore, for an edict of executry from the commissary, present a petition to the commissary for the appointment of an executor, which petition shall be in the form as nearly as may be of the Schedule (A) hereunto annexed, and shall be subscribed by the petitioner, or by his agent.

3. [*To whom petition to be presented.*—Such petition shall be presented to the commissary of the county wherein the deceased died domiciled, and in the case of persons dying domiciled furth of *Scotland*, or without any fixed or known domicile, having personal or moveable property in *Scotland*, to the commissary of *Edinburgh*.

4. [*Mode of intimating petition.*—Every such petition, in place of being published at the kirk-door or market-cross, as edicts of executry have been in use to be published, shall be intimated by the commissary-clerk affixing on the door of the Commissary Court-house, or in some conspicuous place of the Court and of the office of the commissary-clerk, in such manner as the commissary may direct, a full copy of the petition, and by the keeper of the record of edictal citations at *Edinburgh* inserting in a book, to be kept by him for that purpose, the names and designations of the petitioner and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be decerned executor, which particulars the keeper of the record of edictal citations shall cause to be printed and published weekly, along with the abstracts of the petitions for general and special services, in the form of Schedule (B) hereunto annexed : Provided always, that to enable the keeper of the record of edictal citations to make such publication, the commissary-clerk shall transmit to him the said particulars, and to enable the commissary clerk to grant the certificate after-mentioned, the keeper of the record of edictal citations shall transmit to the commissary-clerk a copy, certified by the said keeper, of the printed and published particulars, all in such form and manner and on payment of such fees as the Court of Session by Act of Sederunt may direct.



5. [*Certificate of intimation of petition. Additional intimation of petition in certain cases.*].—The commissary-clerk, after receiving the certified copy of the printed and published particulars, shall forthwith certify on the petition that the same has been intimated and published, in terms of the provisions of this Act, in the form of Schedule (C) hereunto annexed, and such certificate shall be sufficient evidence of the facts therein set forth: Provided always, that where a second petition for confirmation is presented in reference to the same personal estate, the commissary shall direct intimation of such petition to be made to the party who presented the first petition.

6. [*Procedure on petition. Decree-dative. Proviso as to caution.*].—On the expiration of nine days after the commissary-clerk shall have certified the intimation and publication of a petition for the appointment of an executor as aforesaid, the same may be called in Court, and an executor decerned, or other procedure may take place, according to the forms now in use in case of edicts of executry, and with the like force and effect; and decree-dative may be extracted on the expiration of three lawful days after it has been pronounced but not sooner: Provided always that nothing herein contained shall alter or affect the law as to executors finding caution; and that bonds of caution for executors may be partly printed and partly written.

7. [*Not to affect present procedure.*].—Provided always that nothing hereinbefore contained shall alter or affect the course of procedure now in use before the commissaries in confirmations of executors-nominate.

8. [*Where inventories, &c., may be recorded. Confirmations may be granted.*].—Inventories of personal estates of deceased persons and relative testamentary writings may be given up and recorded in, and confirmations may be granted and issued by, any Commissary Court to which it is competent to apply in virtue of the provisions of this Act for the appointment of an executor-dative to the deceased.

9. [*Inventory may include personal estate in any part of United Kingdom.*].—From and after the date aforesaid it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in *Scotland* any personal estate or effects of the deceased situated in *England* or in *Ireland*, or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in *Scotland*, which interlocutor shall be conclusive evidence of the fact of domicile: Provided also, that the value of such personal estate and effects situated in *England* or *Ireland* respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom.

10. [*Form and effect of confirmations.*].—Confirmations shall be in the form, or as nearly as may be in the form, of Schedules (D) and (E) here-

unto annexed ; and such confirmations shall have the same force and effect with the like writs framed in terms of the Acts of Sederunt passed on the twentieth *December*, one thousand eight hundred and twenty-three and the twenty-fifth *February* one thousand eight hundred and twenty-four, or at present in use.

11. [*Oaths before whom to be taken.*].—Oaths and affirmations on inventories of personal estates given up to be recorded in any Commissary Court may be taken either before the commissary or his depute, or the commissary-clerk or his depute, or before any commissioner appointed by the commissary, or before any magistrate or justice of the peace within the United Kingdom or the colonies, or any *British* consul.

12. [*Confirmation produced in Probate Court of England, and sealed, to have the effect of probate or administration.*].—From and after the date aforesaid, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the principal Court of Probate in *England*, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in *Scotland*, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *England* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.

13. [*Confirmation produced in Probate Court of Dublin, and sealed, to have the effect of probate or administration.*].—From and after the date aforesaid, where any confirmation of the executor of a person who shall so be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *Ireland*, shall be produced in the Court of Probate in *Dublin*, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in *Scotland*, such confirmations shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in *Ireland* as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in *Dublin*.

14. [*Probate or letters of administration produced in Commissary Court and certified, to have effect of confirmation.*].—From and after the date aforesaid, when any probate or letters of administration to be granted by the Court of Probate in *England* to the executor or administrator of a person who shall be therein, or by any note or memorandum written thereon signed by the proper officer stated to have died domiciled in *England*, or by the Court of Probate in *Ireland* to the executor or administrator of a person who shall in like manner be stated to have died domiciled

in *Ireland*, shall be produced in the Commissary Court of the county of *Edinburgh*, and a copy thereof deposited with the commissary-clerk of the said Court; the commissary-clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the Schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect and have the same operation in *Scotland* as if a confirmation had been granted by the said Court.\*

15. *For securing the stamp duties, probates, &c., to be deemed granted for all the property in the United Kingdom. Inventory to include all such property.*—In any of the aforesaid cases where the deceased person shall be stated in or upon the probate or letters of administration to have been domiciled in *England* or in *Ireland*, as the case may be, such probate or letters of administration shall, for the purpose of securing the payment of the full and proper stamp duties, be deemed and considered to be granted for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom, within the meaning of the Act of Parliament passed in the fifty-fifth year of the reign of King *George* the Third, chapter one hundred and eighty-four, and of all other Acts of Parliament granting or relating to stamp duties on probates and letters of administration in *England* and *Ireland* respectively; and the affidavit required by law to be made on applying for probate or letters of administration in *England* or *Ireland* as to the value of the estate and effects of the deceased; and also where the commissary shall in manner aforesaid find that the deceased was domiciled in *Scotland*, the inventory required by law to be exhibited and recorded in the proper Commissary Court in *Scotland* before obtaining confirmation, or intermitting with or entering upon the possession or management of the personal or moveable estate or effects of the deceased in *Scotland*, shall respectively extend to and include the whole of the personal and moveable estate of the deceased person in the United Kingdom and the value thereof; and the stamp duties for the time being chargeable on probates and letters of administration and on inventories respectively shall be chargeable upon any probate or letters of administration to be granted, and any inventory to be exhibited and recorded as aforesaid respectively, for and in respect of the whole of the personal and moveable estate and effects of the deceased in the United Kingdom and the value thereof; and the said affidavit shall also separately specify the value of the said estate and effects in *Scotland*.

16. *[Provisions of former Acts to apply to the probates, letters of administration, and inventories mentioned in this Act.]*—For the purpose aforesaid, and also for granting relief where too high a stamp-duty shall have been

\* The "Confirmation and Probate Amendment Act, 1859" (22 Vict. c. 30), indemnifies and protects all persons, &c., making payments upon confirmations and probates under the Act of 1858, notwithstanding any defect or circumstance affecting their validity.

paid on any such probate, or letters of administration, or inventory, the provisions contained in sections forty, forty-one, forty-two, and forty-three, of the said Act passed in the fifty-fifth year of His Majesty King George the Third, relating to probates and letters of administration granted in *England*, and the like provisions in the Act passed in the fifty-sixth year of the said King, chapter fifty-six, relating to probates and letters of administration granted in *Ireland*, and the provisions contained in the Act passed in the forty-eighth year of the said King, chapter one hundred and forty-nine, relating to inventories in *Scotland*, and also all other provisions contained in the said Acts respectively, or in any other Act or Acts relating to probates and letters of administration and inventories respectively, shall apply to the probates and letters of administration to which effect is given by this Act, and to the whole of the personal and moveable estate of the deceased for or in respect of which the same shall, in pursuance of this Act, be deemed to be granted, wheresoever situate in the United Kingdom; and also to the inventories in which the whole of the personal and moveable estate of the deceased, wheresoever situate in the United Kingdom, ought, in pursuance of this Act, to be included, in as full and ample a manner as if all such provisions were herein enacted in reference to such probates, letters of administration, and inventories respectively.

17. [*Affidavit as to domicile to be made on applying for probate or administration.*].—Provided that in any case where, on applying for probate or letters of administration, it shall be required to be stated as aforesaid that the deceased was domiciled in *England* or in *Ireland*, the affidavit so as aforesaid required by law shall specify the fact according to the deponent's belief, which shall be sufficient to authorise the same to be so stated in or upon the probate or letters of administration: Provided also, that any such statement, and the interlocutor of the commissary finding that the deceased was domiciled in *Scotland*, shall be evidence and have effect for the purposes of this Act only.

18. [*Acts of Sederunt to be passed for following out purposes of this Act.*].—It shall be competent to the Court of Session, and they are hereby authorised and required, from time to time, to pass such Acts of Sederunt as shall be necessary and proper for regulating in all respects the proceedings under this Act before the commissary of *Edinburgh* and other commissaries in *Scotland*, and following out the purposes of this Act, and also the fees to be paid to agents before the said Courts, and to the commissary-clerks and other officers of Court, and the expense of publication of petitions.

19. [*Former Acts of Sederunt repealed if inconsistent with this Act.*].—All former Acts, and Acts of Sederunt made in virtue thereof, so far as inconsistent with the present Act, are hereby repealed; and this Act may be amended or repealed by any Act to be passed during the present session of Parliament, and may be cited as the "Confirmation and Probate Act, 1858."

20. [*Interpretation of terms.*—The word “commissary” shall include commissary depute, and the term “commissary-clerk” shall include commissary-clerk depute.

## SCHEDULES to which the foregoing Act refers.

### SCHEDULE (A).

#### *Form of Petition for Appointment of an Executor to a Deceased Person.*

Unto the honourable the Commissary of [*specify the county*],  
the Petition of *A B* [*here name and design the petitioner*];

Humbly sheweth,

That the late *C D* [*here name and design the deceased person to whom an executor is sought to be appointed*], died at [*specify place*], on or about the [*specify date*], and had at the time of his death his ordinary or principal domicile in the county of [*specify county, or “furth of Scotland,” or “without any fixed domicile,” or “without any known domicile,” as the case may be*].

That the petitioner is the only son and next of kin [*or state what other relationship, character, or title the petitioner has, giving him right to apply for the appointment of executor*].

May it therefore please your Lordship to decern the petitioner executor-dative *qua* next of kin to the said *C D* [*or state the other character in which the petitioner claims to be appointed executor*].

According to justice, &c.

[*Signed by the petitioner or his agent.*]

### SCHEDULE (B).

#### *Roll of Petitions for the appointment of Executors in Commissary Courts in Scotland.*

| County.    | Name and Designation of Petitioner. | Title of Petitioner. | Name and Designation of Defunct.    | Place and Date of Birth.                        |
|------------|-------------------------------------|----------------------|-------------------------------------|---|
| Edinburgh. | <i>A B</i> , Writer in Edinburgh.   | Next of Kin.         | <i>C D</i> , Merchant in Edinburgh. | No. George Street, Edinburgh, 1st January 1857. |

## SCHEDULE (C).

*Form of Certificate by Commissary-Clerk of Publication of a Petition for the appointment of an Executor.*

I, *A B*, commissary-clerk [or "commissary-clerk depute," *as the case may be*], of the county of [*specify county*], hereby certify that this petition was intimated by affixing a copy thereof on the door of the Court-house [*if some other place has been directed by the commissary, specify it*], on the [*specify date*], and by being published by the keeper of the record of edictal citations at Edinburgh, in the printed roll of petitions for the appointment of executors in the Commissary Courts of Scotland, printed and published on [*specify date*].

*A B*

## SCHEDULE (D).

*Form of a Testament-Dative or Confirmation of the Executor of a person who has died without naming one.*

I, *A B*, commissary of the county of [*specify county*], considering that by my decree, dated [*specify date*], I decerned *C D* executor-dative *qua* next of kin [or *other character, as the case may be*], of the late *E F*, who died at [*specify place*], on [*specify date*], and seeing that the said *C D* has since given up on oath an inventory of the personal estate and effects of the said *E F*, at the time of his death situated in Scotland [or situated in Scotland and England, or in Scotland and Ireland, or in Scotland, England, and Ireland, *as the case may be*], amounting in value to \_\_\_\_\_ pounds, which inventory has been recorded in my Court books, of date [*specify date*], and that he has likewise found caution for his acts and intromissions as executor: Therefore I, in Her Majesty's name and authority, make, constitute, ordain, and confirm the said *C D* executor-dative *qua* [*specify character*] to the defunct, with full power to him to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-dative *qua* [*specify character*] is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariat [*specify county*], and signed by the Clerk of Court at [*specify place*], the [*specify date*].

[*To be signed by the commissary-clerk or his depute, and sealed with the seal of office.*]

## SCHEDULE (E).

*Form of a Testament Testamentar or Confirmation of an Executor-Nominate.*

I, *A B*, commissary of the county of [*specify county*], considering that the late *C D* died at [*specify place*], upon [*specify date*], and that by his last will [*or other writing containing the nomination of executor*], dated [*specify date*], and recorded in my Court books upon [*specify date*], the said *C D* nominated and appointed *E F* to be his executor, and that the said *E F* has given up on oath an inventory of the personal estate and effects of the said *C D* at the time of his death situated in Scotland [*or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the case may be*], amounting in value to pounds, which inventory has likewise been recorded in my Court books of date [*specify date*]: Therefore I, in Her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foressaid last will [*or other writing containing the nomination of executor*]; and I give and commit to the said *E F* full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong; providing always, that he shall render just count and reckoning for his intromissions therewith when and where the same shall be legally required.

Given under the seal of office of the commissariat of [*specify county*],  
and signed by the Clerk of Court at [*specify place*], the [*specify date*].

[*To be signed by the commissary-clerk or his depute,  
and sealed with the seal of office.*]

## SCHEDULE (F).

I, *A B*, commissary-clerk [*or commissary-clerk depute*] of the county of Edinburgh, hereby certify that this grant of probate has [*or these letters of administration have*] been produced in the Commissary Court of the said county, and that a copy thereof has been deposited with me.

ACT OF SEDERUNT to regulate Proceedings before Commissaries, and the Fees of Clerks of Commissary Courts, under the Act of Parliament 21 & 22 Vict. c. 56.—19th March, 1859.

THE Lords of Council and Session, in pursuance of the powers vested in them by the said Act, do hereby enact and declare—

1. That when a petition is presented to the commissary for the appointment of an executor, the commissary-

clerk of Edinburgh shall transmit, in a safe and convenient manner, and the other commissary-clerks shall transmit,

through the post-office, to the keeper of the record of edictal citations at Edinburgh, a note specifying the names and designations of the petitioner, and of the deceased person, the place and date of his death, and the character in which the petitioner seeks to be deemed executor; and the said note of particulars shall be framed as nearly as may be in the form of Schedule (B) annexed to the said Act, and shall be dated and subscribed by the commissary-clerk.

2. That the keeper of the record of edictal citations shall transmit through the post-office, to the commissary-clerk, a certified copy of the printed and published particulars, in the form of Schedule (B) annexed to the said Act, and which copy shall be dated and subscribed by the said keeper, and the said certified abstracts shall be preserved by the commissary-clerk, and made patent to all persons desiring to see the same, on payment of the fee specified in the table hereto annexed.

3. That the copies of the abstracts of petitions for the appointment of an executor shall be printed by the keeper of the record of edictal citations, and sold to the public at such prices as may be estimated to be sufficient to pay the expense of printing the same; and the printing and sale of the said abstracts shall be subject to the same regulations as those applicable to the minute book and record of edictal citations, by the 22nd section of the Act 1 & 2 Vict. c. 118.

4. That the certificate of intimation to be granted by the commissary-clerk, in terms of section 5 and Schedule (C) of the Act, shall be dated, and date of the certificate shall regulate the time when the petition for appointment of an executor may be called in Court, in terms of section 6 of the Act.

5. That when a second petition for confirmation is presented in reference to the same personal estate, intimation shall be made to the party who presented the first petition, in terms of the 5th section of the Act; and in all other respects the procedure regarding such second petition shall be the same as that directed by the Statute and this Act in regard to a first petition.

6. That when a party shall be desirous to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both, a statement to that effect shall be made either in the original petition for appointment of an executor, or in a separate petition to be presented to the commissary.

7. That the certificate to be granted by the commissary-clerk of the county of Edinburgh upon grants of probate and administration, in terms of section 14 and Schedule (F) of the Act, shall be dated as well as subscribed by him.

8. That all copies of probates or letters of administration deposited with the commissary-clerk of the county of Edinburgh, under the 14th section of the said Act, shall be made patent to all persons desiring to see the same, on payment of the fee specified in the table hereto annexed; and when required, the said commissary-clerk shall furnish copies or excerpts of said documents on payment of the fee specified in the said table.

9. That the practitioners in the Commissary Courts shall be entitled to charge the fees contained in the table authorised by the Act of Sederunt of 10th March, 1849, so far as applicable to the proceedings under the said Act of 21 & 22 Vict. c. 56.

10. That from and after the 1st day of April next the clerks of all Commissary Courts shall be entitled to charge the fees specified in the table hereto annexed, until the same shall be altered in terms of law, and no other or higher fees shall be charged by them.

11. That the said clerks and their successors in office, shall enter in a book to be kept by them for the purpose, an accurate account of the whole fees and emoluments received by them from the commencement of this Act, and shall, on the 1st of April in each year, or within ten days thereafter, transmit to the Queen's Remembrancer in Exchequer an abstract of the fees and emoluments received by them for the year immediately preceding, in order that the amount of such fees and emoluments may be known.



And the Lords appoint this Act, and the relative table of fees, to be inserted in the Books of Sederunt, and printed and published in common form.

DUN. M'NEILL, I.P.D.

#### TABLE OF FEES FOR CLERKS OF COMMISSARY COURTS.

##### I.—*In Applications for Appointments of Executors-dative, and other Procedure, under the Act 21 & 22 Vict. c. 56 :—*

1. For receiving, examining, and marking each petition for the appointment of an executor-dative, affixing copies thereof, framing and transmitting, free of charge, the abstract thereof to the keeper of the record of edictal citations, receiving and examining abstract published by said keeper, writing the certificate of intimation on the principal petition, including fee on the decree-dative, . . . £0 10 0
2. And, in addition, when a second petition is presented, besides the above fees on such second petition, if the clerk shall be directed to intimate the same, for such intimation, . . . . . 0 2 6

##### II.—*Inventories, Confirmations, and other Official Business :—*

3. For receiving and examining inventories with relative oath, and for receiving and examining testamentary writings containing appointment of executors and relative inventory and oath :—

|   |        |
|---|--------|
| When the amount of the inventory is under £100, . . . | 0 2 6  |
| £100 and under 200, . . .                             | 0 3 6  |
| 200     "     300, . . .                              | 0 5 0  |
| 300     "     500, . . .                              | 0 7 0  |
| 500     "     700, . . .                              | 0 8 0  |
| 700     "     1000, . . .                             | 0 10 0 |
| 1000     "     3000, . . .                            | 0 12 6 |
| 3000     "     5000, . . .                            | 0 15 0 |
| 5000     "     10,000, . . .                          | 1 0 0  |
| 10,000     "     20,000, . . .                        | 1 10 0 |
| 20,000     "     40,000, . . .                        | 2 0 0  |
| 40,000 and upwards, . . .                             | 3 0 0  |

4. For expediting confirmations—

(a.) Testaments-dative, for all the duties (besides the charge for writings, see Art. 7), . . . . . 0 3 0

Elks thereto at same rate.

(b.) Testaments testamentar—

|  |       |
|--|-------|
| When the amount of the inventory is under £50, . . . | 0 1 0 |
| £50 and under 100, . . .                             | 0 2 6 |
| 100     "     200, . . .                             | 0 4 0 |

When the amount of the

|                                   |    |    |   |
|-----------------------------------|----|----|---|
| inventory is £200 and under £300, | £0 | 5  | 0 |
| 300 " 500,                        | 0  | 7  | 0 |
| 500 " 1000,                       | 0  | 10 | 0 |
| 1000 " 2000,                      | 0  | 12 | 6 |
| 2000 " 3000,                      | 0  | 15 | 0 |
| 3000 " 4000,                      | 1  | 0  | 0 |
| 4000 " 5000,                      | 1  | 5  | 0 |
| 5000 " 10,000,                    | 1  | 10 | 0 |
| 10,000 " 20,000,                  | 2  | 0  | 0 |
| 20,000 " 40,000,                  | 4  | 0  | 0 |
| 40,000 and upwards,               | 5  | 0  | 0 |

Bills to testaments testamentar at same rates.

5. For making out and receiving bonds of caution—

|                                 |   |    |   |
|---------------------------------|---|----|---|
| When the caution is under £300, | 0 | 5  | 0 |
| £300 and under 500,             | 0 | 7  | 6 |
| 500 and upwards,                | 0 | 10 | 0 |

6. For restriction of caution, including the deliverance, and receiving and marking productions, . . . . .

0 2 6

7. For writing, viz.—

For recording testaments, inventories, and all other matters required to be recorded; for extracts and copies from records, extracts of inventories or testaments, including certificate on certified copies, and generally for all writings, per sheet of writing or printing, .

0 1 6

NOTE.—Every sheet to contain 250 words; one sheet to be charged when the whole writing does not exceed 250 words, and if there be any remaining number of words after calculating the number of sheets of 250 words each, such remainder to be charged as an additional sheet.

8. To the commissary-clerk of Edinburgh—

(a.) For collation of English and Irish probates, or letters of administration, per sheet of 250 words, . . .

0 0 2

(b.) For entering abstracts of such probates, or letters of administration in the commissary books, and granting certificate, in form of Schedule (F), . . .

0 10 6

9. For furnishing materials for and appending the seal of Court to confirmations and other writs, . . . . .

0 1 0

10. Attendance at sealing repositories or other similar business (exclusive of the fee for marking the petition), per hour, . . . . .

0 6 8

11. For searches :—

(a.) For giving inspection of any of the records of Court,

|  |        |
|--|--------|
| and, in Edinburgh, of any copy probate lodged with the clerk, each case, when not exceeding five years back, . . . . .   | £0 1 0 |
| If beyond five years, . . . . .  | 0 2 6  |
| (b.) For searching for a process or any particular document, when the search is made by the clerk, including certificate of search, when required. If beyond one year, and not exceeding five, . . . . . | 0 2 6  |
| Five years and upwards, . . . . .  | 0 5 0  |
| 12. For certificates of registration of testamentary and other documents, . . . . .  | 0 2 6  |
| 13. For each caveat, . . . . .   | 0 2 6  |

III.—*Judicial Business*.—

|  |       |
|--|-------|
| 14. For receiving, and marking, and calling every summons or original petition, others than those under No. 1, . . . . | 0 1 0 |
| 15. For every defence, answer, and reply, . . . . .  | 0 1 0 |
| 16. For receiving and marking each set of productions, except the first, . . . . .                                     | 0 0 6 |
| 17. For each deposition of a witness, including attendance at proofs, . . . . .  | 0 0 9 |
| 18. For lending or receiving back process, and comparing the same with the inventory, and scoring the receipt, . . . . | 0 0 6 |
| 19. For diligence to cite witnesses, writing included, . . . .   | 0 1 0 |
| 20. For second do. do., . . . . .  | 0 1 6 |
| 21. For arrestments and loosing of do., each, . . . . .  | 0 1 0 |
| 22. For caption to compel production of process, . . . . .   | 0 0 6 |
| 23. For marking intimation of sists on bills of advocation, and sisting procedure, . . . . .                           | 0 2 6 |
| 24. For each deliverance or decree, except those under Nos. 1 and 6, . . . . .   | 0 2 6 |
| 25. For edicts of curatory, . . . . .  | 0 1 0 |
| 26. For an act of curatory, per sheet, . . . . .   | 0 1 0 |
| 27. For extracts (judicial), per sheet, . . . . .  | 0 1 0 |

DUN. McNEILL, I.P.D.

38 & 39 *Vict.* c. 41.—An ACT for the relief of Widows and Children of Intestates in *Scotland* where the Personal Estate is of Small Value.—19th July, 1875.

WHEREAS many poor persons die intestate in Scotland possessed of personal estate of small amount, and it is desirable to increase the facilities

for expediting confirmation to such estate and effects, and to reduce the expense attending the same :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*]—This Act may be cited for all purposes as the Intestates Widows and Children (Scotland) Act, 1875.

2. [*Extent of Act.*]—This Act shall extend to Scotland only.

3. [*Where estate does not exceed £150, widow or children may apply to commissary-clerk to fill up inventory and expedite confirmation.*]—Where the whole personal estate and effects of an intestate dying domiciled in Scotland shall not exceed in value the sum of one hundred and fifty pounds, his widow or any one or more of his children, or in the case of an intestate widow any one or more of her children, may apply to the commissary-clerk of the county within which the intestate was domiciled at the time of death ; and the said commissary-clerk shall prepare and fill up an inventory and relative oath, as nearly as may be in the form of Schedule (A) appended to this Act, and shall take the oath of the applicant thereto, and on caution being found by the applicant according to the practice of the Commissary Court, shall proceed to record said inventory and expedite confirmation in the form as nearly as may be of Schedule (B) annexed to this Act, and shall deliver the same to the applicant without the payment of any fee therefor save as is provided in Schedule (C) annexed to this Act : Provided always, that where the value of the said estate and effects exceeds the sum of one hundred pounds the said inventory shall be duly stamped before being recorded ; and such confirmation shall have the same force and effect as that prescribed in Schedule (D) annexed to the Act of the twenty-first and twenty-second Victoria, chapter fifty-six ; and where such confirmation shall contain English or Irish estate, the Registrar of any Probate Court in England or Ireland shall affix the seal of the said Court thereto on the confirmation being sent to him by the commissary-clerk for that purpose, enclosing a fee of two shillings and sixpence.

4. [*Proof of identity and relationship may be required.*]—The commissary-clerk of the county may require such proof as he may think sufficient to establish the identity and relationship of the applicant.

5. [*Commissary-clerk may refuse to proceed if not satisfied that whole estate not more than £150.*]—If the commissary-clerk of the county has reason to believe that the whole personal estate and effects of which the intestate died possessed exceeds in value one hundred and fifty pounds, he shall refuse to proceed with the application until he is satisfied as to the real value thereof.

6. [*Commissary-clerk may administer oath. "Commissary-clerk" to include "commissary-clerk depute."*]—All commissary-clerks shall for the purpose of this Act have power, and are hereby authorised to administer oaths and to

take declarations and affirmations. The term "commissary-clerk" shall throughout this Act include "commissary-clerk depute."

7. [*Procedure and fees under this Act to be regulated by Act of Sederunt.*—Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed, and may from time to time be altered by the Court of Session by Act of Sederunt; but the total amount to be charged to applicants shall not in any case exceed the sums mentioned in the Schedule (C) annexed to this Act.

8. [*Inventory duty not affected by this Act.*—Provided always, that nothing herein contained shall be construed to affect any duty now payable on inventories of personal estate.

#### SCHEDULE (A).

##### *Form of Inventory and Relative Oath.*

INVENTORY of the PERSONAL ESTATE wheresoever situated, of [*name and description of deceased*], who died at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_.

| SCOTLAND.   | £ | s. | d. |
|---|---|----|----|
| 1. Cash in the house, . . . . .   |   |    |    |
| 2. Household furniture and other effects in the deceased's house, . . . . .                               |   |    |    |
| 3. Stock in trade and other effects belonging to deceased, . . . . .                                      |   |    |    |
| 4. Sum in bank—viz, ( <i>specify it, with interest thereon to date of oath to Inventory</i> ),* . . . . . |   |    |    |
| *( <i>Add any other estate in the usual form.</i> )   |   |    |    |

At \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_, in presence of \_\_\_\_\_, Esquire, commissary-clerk of the commissariat of \_\_\_\_\_, Appeared [*name and description of applicant*], who, being solemnly sworn and examined, depones, that the said \_\_\_\_\_ died at \_\_\_\_\_, upon the \_\_\_\_\_ day of \_\_\_\_\_, and had at the time of his [*or her*] death his [*or her*] ordinary or principal domicile in the county of \_\_\_\_\_: That the deponent is the [*widow or son or daughter*] of the said deceased \_\_\_\_\_, and is desirous to enter upon the possession and management of the

deceased's estate as his [or her] executor: That the deponent does not know of any testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof: That the foregoing inventory, signed by the deponent and the said , as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased , wheresoever situated and belonging or due to him [or her] beneficially at the time of his [or her] death, in so far as the same has come to the deponent's knowledge: That the value at this date of the said personal estate and effects, including the proceeds accrued thereon down to this date, does not exceed £150 sterling: That confirmation of the said personal estate in Scotland [England and Ireland as the case may be] is required in favour of deponent. All which is truth, as the deponent shall answer to God.

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#### SCHEDULE (B).

##### *Form of Confirmation.*

*Confirmation issued under the Act, 38 & 39 Vict. c. 41.*

CONFIRMATION DATIVE of *A B*, who resided at [name and description of deceased].

The said *A B* had pertaining and resting owing to , at the time of his [or her] decease,

[Take in inventory of estate to be confirmed.]

I,

, Esquire, commissary of the county of

, considering that the said *A B* died at

on

, and had at the time of death his [or her] ordinary or principal domicile in the county of : And seeing that

*C D*, his [widow, or son, or daughter, or her son or daughter], has given up, on oath, an inventory of the personal estate and effects of the said *A B* at the time of death, including the proceeds accrued thereon to date of oath, situated in Scotland [England and Ireland, as the case may be], amounting in value to , and has deponed that the whole personal estate and effects of the said *A B* does not exceed in value £150, which inventory

as before written, has been recorded in my Court books, of date , and that has [or have] likewise found caution for acts and intrusions as executor [or executors]. Therefore I, in Her Majesty's name and authority, decern, make, constitute, ordain, and confirm the said

*C D* executor [or executors] dative *qua* [relict or next of kin] to the deceased, with full power to to uplift, receive, administer, and dispose of the said personal estate and effects, and grant discharges thereof,

if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor dative *qua*

is known to belong : Providing always, that                      shall render just count and reckoning for                      intromissions therewith, when and where the same shall be legally required.

Given under the seal of office of the commissariot of

and signed by the Clerk of Court at

day of

, the

, one thousand eight

hundred and

*Commissary-Clerk.*

#### SCHEDULE (C).

Where the whole estate and effects of the intestate shall not exceed in value twenty pounds, the sum of five shillings, and where the whole estate and effects shall exceed in value twenty pounds, the sum of five shillings and the further sum of one shilling for every ten pounds or fraction of ten pounds by which the value shall exceed twenty pounds.

39 & 40 *Vict.* c. 24.—An ACT for the Relief of the Executors of Testates in Scotland where the Personal Estate is of Small Value.—13th July, 1876.

WHEREAS many poor persons die testate in Scotland possessed of personal estate of small amount, and it is desirable to increase the facilities for expediting confirmation to such estate and effects, and to reduce the expense attending the same :

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. [*Short title.*—This Act may be cited for all purposes as the “Small Testate Estates (Scotland) Act, 1876.”

2. [*Extent of Act.*—This Act shall extend to Scotland only.

3. [*Where estate does not exceed £150, executor may apply to commissary-clerk to fill up inventory and expedite confirmation.*—Where the whole real and personal estate and effects of a testate dying domiciled in Scotland shall not exceed in value the sum of one hundred and fifty pounds, the executors of such testate may apply to the commissary-clerk of the county within which such testate was domiciled at the time of death ; and the said commissary-clerk, on production of the will or other writing of the testate containing the nomination of an executor, shall prepare and fill up an inventory and relative oath, as nearly as may be in the form of Schedule

(A) appended to this Act, and, upon such inventory being duly sworn to by the executor, shall proceed to record said will or other writing and inventory, and expedite confirmation in the form as nearly as may be of Schedule (B) annexed to this Act, and shall deliver the same to the executor without the payment of any fee therefor save as is provided in Schedule (C) annexed to this Act; and such confirmation shall have the same force and effect as that prescribed in Schedule (E) annexed to the Act of the twenty-first and twenty-second Victoria, chapter fifty-six: and where such confirmation shall contain English or Irish estate the registrar of any Probate Court in England or Ireland shall affix the seal of the said Court thereto on the confirmation being sent to him by the commissary-clerk for that purpose, enclosing a fee of two shillings and sixpence.

4. [*Proof of identity.*].—The commissary-clerk of the county may require such proof as he may think sufficient to establish the identity of the executor.

5. [*Commissary-clerk must be satisfied that whole estate is under £150.*].—If the commissary-clerk of the county has reason to believe that the whole real and personal estate and effects of which the testate died possessed exceed in value one hundred and fifty pounds, he shall refuse to proceed with the application until he is satisfied as to the true value thereof.

6. [*Who may administer oath.*].—Oaths or affirmations under this Act or under the Intestates Widows and Children's (Scotland) Act, 1875, shall, notwithstanding anything to the contrary in the last-mentioned Act, be administered in the manner provided by section 11 of the Confirmation and Probate Act, 1858.

7. [*Procedure and fees.*].—Any rules and orders and tables of fees requisite for carrying this Act into operation shall be framed and may from time to time be altered by the Court of Session by Act of Sederunt; but the total amount to be charged to executors shall not in any case exceed the sums mentioned in Schedule (C) annexed to this Act.

8. [*Inventory duty not affected.*].—Provided always, that nothing herein contained shall be construed to affect any duty now payable on inventories of personal estate.



## SCHEDULES.

## SCHEDULE (A).

*Form of Inventory and Relative Oath.*

INVENTORY of the PERSONAL ESTATE and EFFECTS, wheresoever situated,  
of *A B* [*design deceased*], who died testate, on the       day of  
     , 18   , at       , and had at the time of death his  
[or her] ordinary or principal domicile in the county of *A*.

## I. SCOTLAND.

1. Cash in the house, . . . . . £
  2. Household furniture and other effects in the house, . . . . .
  3. Stock-in-trade and other effects belonging to deceased, . . . . .
  4. Money in bank, . . . . . £
- Interest thereon to date of oath to  
inventory, . . . . .

Amount of personal estate in Scotland, . . . . . £

## II. ENGLAND.

1. Principal sum in policy of insurance on life of deceased by  
the *A B* Insurance Company, numbered       , and  
dated       , 18   , . . . . . £
- Vested bonuses, . . . . .

Amount of personal estate in England, . . . . . £

Total amount of personal estate in Scotland and England, £

[*Add under Scotland or England any other estate in usual form.*]

At       , on the       day of       , 18   .

In presence of       .

Appeared *O D* [*design deponent*], who being solemnly sworn and  
examined depones: That the said *A B* [*repeat designation*] died testate, on  
the       day of       , 18   , at       , and had at the time  
of death his [or her] ordinary or principal domicile in the said county of  
*A*: That the deponent is the executor of the said *A B*, and has entered  
upon the possession or management of his or her estate as executor nomi-  
nated by him or her [*along with*       ] in his or her will [*or other  
testamentary settlement or writing*] dated the       day of       , 18   ,  
and now exhibited and signed by the deponent and       , as  
relative hereto: That the deponent does not know of any other will or

testamentary settlement or writing relative to the disposal of the deceased's personal estate or effects, or any part thereof: That the foregoing inventory signed by the deponent and the said \_\_\_\_\_, as relative hereto, is a full and complete inventory of the personal estate and effects of the said deceased *A B*, wheresoever situated and belonging or due to him [or her] beneficially at the time of death, in so far as the same has come to the knowledge of the deponent: That the value at this date of the whole real and personal estate and effects, including the proceeds accrued thereon down to this date, does not exceed £150 sterling: That confirmation of the said personal estate and effects in Scotland [England and Ireland, *as the case may be*] is required in favour of the deponent [*and the said* \_\_\_\_\_]. All which is truth, as the deponent shall answer to God.

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#### SCHEDULE (B).

##### *Form of Confirmation.*

*(Confirmation issued under the Act 39 & 40 Vict. c. 24.)*

CONFIRMATION in favour of *C D*, residing at \_\_\_\_\_, executor nominate of *A B* [*design deceased*], who died testate, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, and had at the time of death his [or her] ordinary or principal domicile in the county of *A*.

The said deceased *A B* had pertaining and resting owing to him [or her] at the time of his [or her] death, the following personal estate and effects, viz. :—

*[Take in particulars of estate as specified in inventory.]*

I, *E F*, Esq., commissary of the said county of *A*, considering that the said *A B* died testate, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, and had at the time of death his [or her] ordinary or principal domicile in the said county of *A*; and, further, considering that the said *A B* by his [or her] will [*or other writing containing the nomination of executor*], dated the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and recorded in my Court books upon the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, nominated and appointed the said *C D* to be his [or her] executor; and now, seeing that the said *C D*, as executor nominate foressaid, has given up on oath an inventory of the whole personal estate and effects of the said *A B*, at the time of his [or her] death, situated in Scotland [*and England and Ireland, as the case may be*], amounting in value to £\_\_\_\_\_, as therein and hereinbefore set forth, and that the said inventory has likewise been recorded in my Court books on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_: Therefore I, in Her Majesty's name and authority, ratify, approve, and confirm the nomination of executor contained in the foressaid will [*or other writing containing the nomination of*

*executor*], and I give and commit to the said *C D* full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally everything concerning the same to do that to the office of an executor nominate is known to belong: Providing always that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required.

Given under the seal of office of the commissariat of the county of *A*,  
and signed by the Clerk of Court at \_\_\_\_\_, on the \_\_\_\_\_ day  
of \_\_\_\_\_, 18 \_\_\_\_.

*Commissary-Clerk.*

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### SCHEDULE (C).

#### *Table of Fees.*

Where the whole personal estate and effects of the testate shall not exceed in value *twenty pounds*, the sum of *five shillings*; and where the whole estate and effects shall exceed in value *twenty pounds*, the sum of *five shillings*; and the further sum of *one shilling* for every *ten pounds*, or fraction of *ten pounds*, by which the value shall exceed *twenty pounds*; together with the ordinary fees exigible for recording the will or other writing of the testate.

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44 *Vict. c. 12.*—An ACT to grant certain Duties of Customs and Inland Revenue, to alter other Duties, and to amend the laws relating to Customs and Inland Revenue.—3rd June, 1881.

34. [*Provision as to inventories where gross value of estate does not exceed £300.* 39 & 40 *Vict. c. 24*, 39 & 40 *Vict. c. 70.*]—(1.) The Intestates Widows and Children (Scotland) Act, 1875, and the Small Testate Estates (Scotland) Act, 1876, as amended by the Sheriff's Court (Scotland) Act, 1876, shall be extended so as to apply to any case where the whole personal estate and effects of a person dying on or after the first day of June, one thousand eight hundred and eighty-one, without any deduction for debts or funeral expenses, shall not exceed the value of three hundred pounds whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, and the fees payable under Schedule (C) of each of the two first-mentioned Acts shall not exceed the

sum of fifteen shillings, inclusive of the fee of two shillings and sixpence, to be paid to the commissary-clerk, or Sheriff-Clerk.

(2.) In any such case where the estate and effects shall exceed the value of one hundred pounds, the stamp duty payable on the inventory shall be the fixed duty of thirty shillings, and no more.

35. [*Provision in case of subsequent discovery that the value of estate exceeded £300.*—Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding three hundred pounds, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to Her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum.

### CHAPTER III.—SUCCESSION TO ABSENTEES.

44 & 45 Vict. c. 47.—An ACT to amend the law as regards the Presumption of Life in persons long absent from Scotland.  
—22nd August, 1881.

WHEREAS great hardships have arisen from the want of any limitation to the presumption of life as regards persons who have been absent from Scotland or have disappeared for long periods of years, and it is desirable that limitation should be provided :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :—

1. [*Presumption of life limited to seven years as regards income.*—In the case of any person who has been absent from Scotland, or who has disappeared, for a period of seven years or upwards, and who has not been heard of for seven years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable or moveable estate in Scotland, or who has become entitled to such estate in Scotland, it shall be competent to any person entitled to succeed to an absent person in such estate to present a petition to the Court setting forth the said facts, and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to uplift and enjoy the yearly income of the heritable or moveable estate of such absent person,

as the case may be, and to grant all requisite discharges for the same, as if the said absent person were dead ; or the Court may sequestrate the estate, and appoint a judicial factor thereon with the usual powers, and with authority to pay over the free yearly income of the estate to the petitioner, whose discharge shall be as valid and effectual as if granted by the absent person.

2. [*Provision for disposal of capital of moveable estate seven years after date of deliverance.*—It shall be competent to the petitioner upon whose petition a deliverance has been granted in terms of the preceding section, authorising him to uplift and enjoy the yearly income of moveable estate, or to the heir or representative of such petitioner, to present another petition to the Court after the lapse of seven years from the date of said deliverance, setting forth that during that further period the said absent person has not been heard of, and after proof of the facts stated in the petition, and such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, and thereupon to receive and discharge, possess and enjoy, the fee or capital of the said moveable estate of the said absent person in the same manner as if the said absent person were dead.

3. [*Provision for disposal of heritable estate thirteen years after date of deliverance.*—It shall be competent to the petitioner or petitioners upon whose petition a deliverance has been granted in terms of section one, authorising him to uplift and enjoy the yearly income of heritable estate, or to the heir or representative of such petitioner, to present another petition to the Court after a lapse of thirteen years from the date of said deliverance, setting forth that during that further period the said absent person has not been heard of, and after proof of the facts stated in the petition, and such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to and enter into possession and enjoyment of the fee of the said heritable estate of the said absent person in the same manner as if the said absent person were dead.

4. [*Provision for disposal of moveable estate after fourteen years' absence where no previous deliverance relative to income under sect. 1.*—In the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, and who has not been heard of for fourteen years, and who at the time of his leaving or disappearance was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveable estate to present a petition to the Court setting forth the said facts ; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, receive and discharge, possess and enjoy, sell or dispose

of the said moveable estate in the same manner as if the said absent person were dead.

5. [*Provision for disposal of heritable estate after twenty years' absence where no previous deliverance relative to income under sect. 1.*].—In the case of any person who has been absent from Scotland, or who has disappeared for a period of twenty years or upwards, and who has not been heard of for twenty years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable estate in Scotland, or who has since become entitled to heritable estate there, it shall be competent to any person entitled to succeed to said absent person in such heritable estate to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, enter into possession of and enjoy, and sell or dispose of the said heritable estate in the same manner as if the said absent person were dead.

6. [*Power to dispense with consent of absent person to sale of property held pro indiviso.*].—Where the absent person shall have been one or two or more *pro indiviso* proprietors of heritable estate in Scotland, and he shall not have been heard of for seven years or upwards after his leaving Scotland or disappearance, and where the other *pro indiviso* proprietor or proprietors shall desire to sell the said estate, it shall be competent to such other *pro indiviso* proprietor or proprietors to present a petition to the Court setting forth the said facts, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner or petitioners to sell the said estate by public roup or private bargain, as the Court may think fit, and the title granted by the said *pro indiviso* proprietor or proprietors under such authority shall be as good and valid to the purchaser as if the absent person had been a party to the sale and conveyance, and in the case of such a sale the share of the price belonging to the absent person shall be paid into bank for behoof of such absent person, and shall be deemed to be heritable estate of the said absent person, and, as such, shall be subject to the provisions of sections one, three, and five hereof.

7. [*Claim of absent person barred after thirty years from date of deliverance.*].—In the event of the absent person having right to heritable or moveable estate in Scotland as aforesaid, or of any person entitled to succeed to or take by title derived from him preferably to the person who has obtained possession of the heritable or moveable estate under any of the preceding sections of this Act, appearing and establishing his right thereto, he shall be entitled to demand and receive the fee or capital of the said estate, heritable or moveable, where extant in the hands of the person or persons who has or have obtained possession thereof as aforesaid, or of any one taking from him by gratuitous title (subject to a claim for the value of any meliorations made thereupon by such person), or to demand and receive the price

obtained for the said property, where the same has been sold, unless a period of thirteen years has elapsed since possession of the fee of such estate was obtained under the other provisions of this Act, and after the expiry of such period of thirteen years all claim by the absent person, or those entitled to succeed or deriving right from him as aforesaid, shall be barred. In no case shall any person who has uplifted the income of property under any of the provisions of this Act, or the income of the price obtained therefor, prior to the absent person or those in his right as aforesaid appearing and intimating their claim, be liable to account for or pay to the absent person or those in his right the income received as aforesaid prior to the intimation of such claim.

8. [*Presumption of time of death.*].—For the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of, at or after such leaving or disappearance.

9. [*Several persons may be conjoined in one petition.*].—Any number of persons entitled to succeed as aforesaid may be conjoined in one petition relating to the estate of the same absent person; and any person having a limited right of succession may appear as petitioner to the effect of having such right made effectual, subject to the provisions of this Act.

10. [*Saving the rights of third parties.*].—It is hereby expressly provided and declared that nothing in this Act contained shall be held to prejudice or affect the right of third parties, having right to the estate or any part of it, preferable to the right of the absent person, or to the right of his representatives derived from him.

11. [*Policies of assurance exempted.*].—This Act shall not apply to any claim under the policy of assurance upon the life of any person who has been absent from Scotland, or who has disappeared, but the person or persons claiming under such policy shall be required to prove the death of the person whose life is assured, in the same manner as if this Act had not been passed.

12. [*Jurisdiction.*].—For the purposes of this Act “the Court” shall mean and include—

(1.) In all cases one of the Divisions of the Court of Session;

(2.) In all cases where the estate of the absent person in Scotland does not exceed in amount or value the sum of one hundred and fifty pounds sterling, the Sheriff Court of the county in which said estate or the greater part thereof is situate: Provided always, that the value of heritable estate shall be ascertained in terms of the provisions of the 40 & 41 Vict. c. 50.

13. [*Short title.*].—This Act may be cited as the Presumption of Life Limitation (Scotland) Act, 1881.

## PART VI.

## APPEALS TO HIGHER COURTS.

20 *Geo. II. c. 43.*—An ACT for taking away and abolishing the Heritable Jurisdictions in that part of Great Britain called *Scotland*; and for making satisfaction to the Proprietors thereof; and for restoring such Jurisdictions to the Crown; and for making more effectual provisions for the Administration of Justice throughout that part of the United Kingdom, by the King's Courts and Judges there; and for obliging all persons acting as Procurators, Writers, or Agents in the Law in *Scotland* to take the Oaths; and for rendering the Union of the two Kingdoms more complete.

34. [*Persons aggrieved by sentence, &c., of the Sheriff-Court, in criminal cases, not inferring loss of life or demembration, or in civil where the sum did not exceed £12, may appeal to the next Circuit Court.*]—And to the end that the jurisdiction of the Circuit Courts, in that part of Great Britain called *Scotland*, may be rendered more useful and beneficial to His Majesty's subjects in that part of the United Kingdom,—Be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any party or parties, conceiving himself or themselves aggrieved by any interlocutor, decree, sentence, or judgment of the Sheriff's or Stewart's Court of any county, shire, or stewartry, or of the Courts of any royal borough, or burgh of regality, or barony, or of any Court of any baron, or other heritor having such jurisdiction, as is not hereby abrogated or taken away, where such interlocutor, decree, sentence, or judgment shall be concerning matters criminal, of whatever nature or extent the same may be, except all cases which infer the loss of life or demembration, or in matters civil, where the subject matter of the suit did not exceed in value the sum of twelve pounds sterling, to complain, and seek relief against the same, by appeal to the next Circuit Court of the circuit wherein such county, shire, or stewartry,



royal burgh, or burgh of regality or barony, or such barony or estate shall lie, so as no such appeal be competent before a final decree, sentence, or judgment pronounced; and such appeal it shall be lawful for the party conceiving himself aggrieved to take and enter in open Court at the time of pronouncing such decree, judgment, or sentence, or at any time thereafter, within ten days, by lodging the same in the hands of the Clerk of Court [*Copy to be delivered to the respondents*], and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause, and serving in like manner the inferior judge himself, in case the appeal shall contain any conclusion against him by way of censure, or reparation of damages, for alleged wilful injustice, oppression, or other malversation; and such service shall be sufficient summons to oblige the respondents to attend and answer at the next Circuit Court which shall happen to be held fifteen days at least after such service [*Circuit Court to proceed in a summary way in hearing appeals, and to award real costs*]; and thereupon the judge or judges at such Circuit Court shall and may proceed to cognosce, hear, and determine any such appeal or complaint, by the like rules of law and justice as the Court of Session or Court of Justiciary respectively may now cognosce and determine in suspensions of the interlocutors, decrees, sentences, or judgments of such inferior Courts; but the said Circuit Court shall proceed therein in a summary way; and in case they shall find the reasons of any such appeal not to be relevant, or not instructed, or shall determine against the party so complaining or appealing, the said judge or judges shall condemn the appellant or complainer in such costs as the Court shall think proper to be paid to the other party, not exceeding the real costs *bona fide* expended by such party; and the decree, sentence, or judgment of such Circuit Court, in any of the cases aforesaid, shall be final.

36. [*Appellants to give bond and security. Clerk of the Court answerable for the security.*].—Provided always that, wherever such appeal shall be brought, such complainer, at the same time he enters his appeal as aforesaid, shall lodge in the hands of the Clerk of Court from which the appeal is taken, a bond with sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying the costs, if any shall be by that Court awarded; and the Clerk of Court shall be answerable for the sufficiency of such cautioner.

37. [*Circuit Courts not being able to determine appeal, to certify the same to the Court of Session.*].—Provided always, and it is hereby enacted by the authority aforesaid, that in case such Circuit Court shall, in cognoscing or proceeding upon such appeal, find any such difficulty to arise, that by means thereof such Circuit Court cannot proceed to the determination of the same consistently with justice and the nature of the case; in any such case, and not otherwise, it shall and may be lawful to and for such Circuit Court to certify such appeal, together with the reasons of such difficulty, and the proceedings thereupon had before such Circuit Court, to the Court of

Session or Court of Justiciary respectively ; which Courts are hereby respectively authorised and required to proceed in and determine the same.

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6 Geo. IV. c. 120.—An ACT for the better regulating of the Forms of Process in the Courts of Law in *Scotland*.—5th July, 1825.

40. [*Interlocutor of Court of Session on proof taken in inferior Courts to be final as to findings of fact.*].—And be it further enacted, That when in causes commenced in any of the Courts of the Sheriffs, or of the magistrates of burghs, or other inferior Courts, matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide ; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor : Provided, however, that except in consistorial causes, the Court of Session shall, in reviewing the sentences of inferior judges, have power to send to the jury Court such issue or issues to be tried by jury as to them shall seem necessary for ascertaining facts which may not have been proven to their satisfaction by the evidence already taken, or which may have been omitted in the cause, the verdict to be returned to the Court of Session, to assist that Court in the determination of the cause ; and the said Court shall also have power to remit the whole cause for trial to the jury Court ; and in neither of these cases shall it be necessary to have the consent of the parties to the cancelling of the depositions already taken in the cause before proceeding to jury trial, but the Court of Session shall have power to give such directions with regard to the proof already taken, or with regard to any part or parts thereof, as to them shall seem just ; to which effect the provision in the foresaid Act of the fifty-ninth year of His late Majesty, in so far as the consent of the parties to the cancelling of the depositions already taken is thereby required, shall be and the same is hereby repealed ; and further, the Court of Session shall have power to remit the cause with instructions to the inferior Court, if that course shall appear to them the most just and expedient in the circumstances of the case ; but it is hereby expressly

provided and declared [*power to advocate against orders for proof in inferior Courts*], that in all cases originating in the inferior Courts in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session, by bill of advocation, which shall be passed at once without discussion and without caution; and in case no such bill of advocation shall be presented, and the parties shall proceed to proof under the interlocutor of the inferior Court, they shall be held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session, in so far as by such judgment the several facts established by the proof shall be found or declared.

44. [*Decrees in actions of removing to be subject only to suspension.*].—And it is further enacted by the authority as aforesaid, That when any judgment shall be pronounced by an inferior Court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above, by bill of advocation to be passed at once, but only by means of suspension, as hereinafter regulated.

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ACT OF SEDERUNT for Repealing certain Acts of Sederunt, of date the 12th day of November, 1825, and subsequent dates, passed for regulating the Forms of Process in the Court of Session, in pursuance of the Statute 6 Geo IV. c. 120; for Consolidating the Enactments contained in said Acts; and also for further Improving the Forms in said Court.—Edinburgh, 11th July, 1828.

5. WHEREAS it is enacted by section 40 that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to advocate such cause to the Court of Session, it is enacted and declared, That if in such cause the claim shall not be simply pecuniary, so that it

cannot appear on the face of the bill that it is above £40 in amount, the party intending to advocate shall previously apply, by petition, to the judge in the inferior Court for leave to that effect, which application shall be intimated to the opposite party or his agent; and the petitioner shall be bound, if required by the judge, to give his solemn declaration that the claim is of the true value of £40 and upwards; and on such petition being presented, and on such declaration, if required, being made to the satisfaction of the

judge, leave shall be granted to advocate, and the clerk of the inferior Court shall certify the same; and it is further enacted and declared, That if, in either class of causes, neither party, within fifteen days in the ordinary case, and in causes before the Courts of Orkney and Shetland, within thirty days after the date of such interlocutor allowing a proof, shall intimate, in the inferior Court, the passing of a bill of advocacy,—such proof may immediately thereafter effectually proceed in the inferior Court, unless reasonable evidence shall be produced to the inferior judge that a bill of advocacy has been presented, or the judge be satisfied

that effectual measures have been taken for presenting it; in which case the inferior judge shall prorogate the time for taking the proof for a reasonable time, not less than seven days after that fixed for the first diet of proof in the ordinary case, and not less than twenty days in cases from Orkney and Shetland; and if, within these periods respectively, no intimation shall be made of any such bill of advocacy, the proof shall then proceed; and the bill, if such have been presented, together with the passing thereof, shall be held to fall, as if such bill had never been presented.

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31 & 32 Vict. c. 100.—An ACT to amend the Procedure in the Court of Session, and the Judicial Arrangements in the Superior Courts of Scotland, and to make certain Changes in the other Courts thereof.—31st July, 1868.

SECT. 53. [*Definition of final judgment in the Outer House.*—It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause or of the competition between the parties in a process of a competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for, and for the purpose of determining the competency of appeals to the Court of Session, this provision shall be applicable to the causes in the Sheriff and other inferior Courts, the name of the Sheriff or other inferior judge or Court being read instead of the words, “the Lord Ordinary,” and the name of the Sheriff Court or other inferior Court being read instead of the words, “Outer House.”

#### VII.—*Appeals from Inferior Courts.*

64. [*Process of advocacy abolished.*—The process of advocacy is hereby abolished.

65. [*Appeals substituted for advocacy.*—Wherever, according to the present law and practice, it is competent to advocate to the Court of Session

a judgment (final or not final, as the case may be) of any Sheriff or other inferior Court or judge, it shall be competent, except as hereinafter provided, to submit such judgment to the review of the Court of Session by appeal in the manner hereinafter provided : Provided always, that it shall not be necessary for the appellant to find caution for expenses before taking or prosecuting his appeal.

66. [*Form of note of appeal.*].—An appeal to the Court of Session under this Act may, when otherwise competent, be taken by a note of appeal written at the end or on the margin of the interlocutor sheet containing the judgment appealed from, or any note thereto annexed, or by a separate note of appeal lodged with the clerk of the inferior Court ; and such note of appeal may be in the following or similar terms :

“The pursuer [*or* defender *or* other party] appeals to the  
Division of the Court of Session :”

And the said note shall specify the Division, and shall be signed by the appellant or his agent, and shall bear the date on which it is signed.

67. [*Not competent to appeal after six months from date of final judgment.*].—It shall not be competent to take or sign any note of appeal after the expiration of six months from the date of final judgment in any cause depending before the Sheriff or other inferior Court or judge, even although such judgment has not been extracted.

68. [*Time at which interlocutors of inferior Courts may be extracted.*].—A party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent ; but on the expiration of the foresaid period, if no appeal shall have been taken, the Clerk of Court may give out the extract ; it being competent, however, to take such appeal at any time within the period of six months from the date of final judgment in the cause, unless the judgment has previously been extracted or implemented.

69. [*Effect of appeals under this Act.*].—Such appeal shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal ; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the Court ; and an appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself.

70. [*Notice of appeal.*].—The Clerk of the inferior Court shall, within two days after the date of any appeal being taken, send written notice of such appeal to the respondent or his agent : Provided that the failure to give such notice shall not invalidate the appeal ; but the Court of Session may give such remedy for any disadvantage or inconvenience thereby occasioned as may in the circumstances be thought proper.

71. [*Form of bringing appeals into Court of Session.*]\* Within two days after the appeal shall have been taken, the clerk of the inferior Court shall transmit the process to one of the clerks of the Division of the Court to which the appeal is taken, who shall subjoin to the appeal a note of the day on which it is received ; and it shall be lawful for either the appellant or the respondent at any time after the expiry of eight days from the date of such note to enrol the appeal ; and when the appeal is called in the roll it shall be competent for the Court to order the whole inferior Court record, and the interlocutors *in causa*, and note of appeal, and notes of the evidence and productions, if any, to be printed and boxed to the Court ; or the Court may dispense with the printing and boxing of any portions of the same ; and in case the record and other papers ordered to be printed shall not be printed and boxed by the appellant, or in case he shall not move in the appeal, it shall be lawful for the Court, on a motion by any other party in the cause, either to dismiss the appeal with expenses, and to affirm the interlocutor of the inferior Court, or to grant an order authorising the party moving to print and box the record and other papers aforesaid, and to insist in the appeal as if it had been taken by himself.

72. [*Proof and judgment upon appeals.*]—The Court may, if necessary, order proof or additional proof to be taken in any appeal under this Act, such proof to be taken in the same manner as proof may be competently taken in any cause depending before the Inner House, and shall thereafter, or without any such order (if no such proof or additional proof is necessary), give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record ; and the record may, with leave of the Court, be amended at any time, on such conditions as to the Court shall seem proper.

73. [*Appeal under § 40 of 6 Geo. IV. c. 120.*]—It shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior Courts in which the claim is in amount above forty pounds at the time and for the purpose and subject to the conditions specified in the fortieth section of the Act Sixth George the Fourth, chapter one hundred and twenty ; and such causes may be remitted to the Outer House.

74. [*Procedure in place of advocations ob contingentiam.*]—In place of advocations of actions and proceedings in inferior Courts *ob contingentiam* of a process in the Court of Session, it shall be lawful for the party desiring to remove any such action or proceeding to the Court of Session to lay before the Lord Ordinary, or the Division of the Court before which such Court of Session process shall actually be at the time, a copy of the inferior Court record or of such pleadings as may have been lodged, and of the interlocutors in the cause, certified by the clerk of the said inferior Court, and to move for the transmission of the inferior Court process to the

\* Altered by the Act of Sederunt of 10th March, 1870, *infra*, p. 856.

Court of Session; and if upon consideration thereof the said Lord Ordinary or Division of the Court shall be of opinion that there is contingency between the said processes, he or they shall grant warrant to the clerk of the inferior Court process for the transmission thereof; and upon such transmission being made, the said process shall thenceforth be proceeded with in all respects as if it had been advocated *ob contingentiam* to the Court of Session according to the present law and practice.

75. [*Exclusion of review in such cases.*—The decision of the Lord Ordinary or of the Court, as the case may be, upon any such motion for transmission, shall be final at that stage; but in the event of the application being refused, it shall be competent for either party to renew the motion at any subsequent stage of the cause.

76. [*Appeals substituted for advocations under special enactments.*—Where, by any statute now in force, special provision is made for removing any action or proceeding in any inferior Court to the Court of Session by advocacy, it shall be lawful to remove any such action or proceeding to the Court of Session by appeal under this Act at the same stage of the cause, for the same purpose, and with such and the like restrictions as are provided by such statute.

77. [*Provisions for completing record in processes removed to the Court of Session by appeal.*—Where it is necessary in any action removed to the Court of Session by appeal under this Act that a record should be made up in the Court of Session, the record shall be made up under the direction of the Division of the Inner House in which the appeal is depending.

78. [*Exclusion of review by advocacy under special enactments to imply exclusion of review by appeal.*—Where, by any statute now in force, the right of review by advocacy to the Court of Session is excluded or restricted, such exclusion or restriction of review shall be deemed and taken to apply to review by appeal under this Act.

79. [*Regulation of interim possession pending appeal to the Court of Session.*—In all cases where the judgment of any inferior Court shall be brought under the review of the Court of Session by appeal, it shall be competent for the inferior Court to regulate in the meantime, on the application of either party, all matters relating to interim possession, having due regard to the manner in which the interests of the parties may be affected by the final decision of the cause; and such interim order shall not be subject to review, except by the Court at the hearing of such appeal, when the Court shall have full power to give such orders and direction in respect to interim possession as justice may require.

80. [*How far provisions of Part VII. to apply to depending actions.*—The whole provisions of Part VII. of this Act shall, so far as possible, apply to all advocations in dependence before the Inner House at the commencement of this Act, and to all advocations which may, after the commencement of this Act, come before the Inner House by report or reclaiming note from any Lord Ordinary: Provided always, that the

advocations depending before the Outer House at the commencement of this Act shall be disposed of in the Outer House according to the present law and practice.

### ACT OF SEDERUNT anent Probation and Appeals from Inferior Courts.—Edinburgh, 10th March, 1870.

III. THAT the course of proceeding prescribed by the 71st section of the said statute shall be altered to the following extent and effect :—

(1.) The appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless, within eight days after the process has been received by the clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part; in which case the appellant shall only print and box, as aforesaid, those papers the printing whereof has not been dispensed with; and if printing has been in whole dispensed with, shall lodge with the Clerk of Court a manuscript copy of the note of appeal, furnishing another copy to the clerk of the Lord President of the Division: And if the appellant shall fail, within the said period of fourteen days, to print and box, or lodge and furnish the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed, as hereinafter provided.

(2.) The appellant shall, during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the clerk he shall have obtained from the Lord Ordinary officiating on the Bills an interlocutor dispensing with printing in whole or in part, for which purpose the assistant-clerk shall, if required, lay the process before the Lord Ordinary on the Bills; and in such case the

appellant shall deposit with the clerk as aforesaid, a print of those papers the printing whereof has not been dispensed with; and, if printing has been in whole dispensed with, shall lodge with the said clerk a manuscript copy of the note of appeal; and the appellant shall upon the box-day or sederunt-day next following the deposit of such print with the clerk, box copies of the same to the Court; or, if printing has been in whole dispensed with, shall furnish to the clerk of the Lord President of the Division a manuscript copy of the note of appeal: And if the appellant shall fail, within the said period of fourteen days, to deposit with the Clerk of Court, as aforesaid, a print of the papers required, or to lodge with him a manuscript copy of the note of appeal, as the case may be, or to box or furnish the same as aforesaid, on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed, as hereinafter provided.

(3.) It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary officiating on the Bills during vacation, to repon him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shown, and upon such conditions as to printing, and payment of expenses to the respondent or otherwise, as to the Court or the Lord Ordinary shall seem just.

(4.) It shall be lawful for the respondent, within eight days after the appeal has been held to be abandoned as afore-



said, if during session, to print and box the note of appeal, record, interlocutors, and proof, if any; and if during vacation, to deposit a print thereof with the Clerk of Court, and thereafter to insist in the appeal, as if it had been taken by himself; in which case the appellant shall also be entitled to insist in the appeal.

(5.) On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken

against the same; and the Clerk of Court shall forthwith retransmit the process to the clerk of the inferior Court; Provided always, that before retransmitting the process, the Clerk of Court or his assistant shall engross upon the interlocutor sheet and sign a certificate in these or similar terms:—

“[Date]—Retransmitted in respect of the abandonment of the appeal;” and, in respect of said certificate, the Sheriff, or other judge of the inferior Court, shall, upon a motion being made before him to that effect, grant decree for payment to the respondent in the appeal of the sum of three pounds three shillings of expenses.

JOHN INGLIS, *I.P.D.*

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## PART VII.

## PROCURATORS' AND OFFICERS' FEES.

ACT OF SEDERUNT regulating the Fees of Agents practising before the Sheriff Courts in Scotland.—Edinburgh, 4th December, 1878.

THE Lords of Council and Session, considering that by Section 54 of the Act of the 39th and 40th year of Her Majesty Queen Victoria, chap. 70, it is provided that—

“The Court of Session may from time to time make such regulations by Act of Sederunt as shall be necessary for carrying into effect the purposes of this Act; and for regulating the forms of petitions and modes of procedure and of pleadings; and generally the practice of the Sheriff Courts in respect of the matters to which the Act relates; and for regulating the fees of Court, with the concurrence of the Commissioners of the Treasury; and also for regulating the fees of the agents practising before the said Courts; and of short-hand writers appointed to take down proofs; and, so far as may be found expedient, for altering the course of proceedings hereinbefore prescribed in respect to the matters to which this Act relates, or any of them; and for regulating the place or places at which, in each county, the business heretofore conducted in the Commissary Court thereof shall be hereafter conducted in the Sheriff Court thereof; and the place or places and manner in which the records, books, documents, papers, and things connected therewith should be hereafter kept; and may also repeal or alter the provisions of any Act of Sederunt relating to

“any of the matters hereinbefore specified, as may be inconsistent with such new regulations; and for that purpose the Court of Session may meet during vacation as well as during Session; and, in preparing such Act of Sederunt, the Court may take the assistance of any six Sheriffs and Sheriffs-Substitute whom they may select: Provided that every such Act of Sederunt shall, within one month after the date thereof, be transmitted by the Lord President of the Court of Session to one of Her Majesty's principal Secretaries of State, in order that it may be laid before both Houses of Parliament, and if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such Act of Sederunt has been laid before such House of Parliament, resolve that the whole or any part of such Act of Sederunt ought not to continue in force, in such case the whole or such part thereof as shall be included in such resolution shall, from and after such resolution, cease to be binding.”

And considering that by the alteration on the forms of process introduced by the said Act, the Act of Sederunt of 1st March, 1861, regulating the fees of

Procurators in the Sheriff, Stewart, and Commissary Courts, has been rendered in various respects inapplicable, and that it is expedient to alter the same : Do therefore, in virtue of the powers conferred by the said Act of Parliament, repeal, as from and after the 31st day of December, 1878, the said Act of Sederunt of 1st March, 1861 ; and provide and enact that, in place of the regulations and table of fees annexed to the said Act of Sederunt, the regulations and table of fees hereto annexed shall, from and after the said 31st day of December, 1878, regulate the fees of agents practising before the Sheriff Courts in Scotland, until the same shall be altered by the Court : And the Lords appoint this Act and the regulations and table of fees hereto annexed to be engrossed in the books of sederunt, and printed and published in common form.

JOHN INGLIS, *I.P.D.*

#### GENERAL REGULATIONS.

1. In the Ordinary Sheriff Court there shall be two scales of taxation, viz., *first*, for causes where the amount of principal and past interest concluded for does not exceed £25 ; *second*, for causes of higher amount. In executry proceedings there shall be one scale of taxation only.

2. Where the demand does not exceed the sum which may be competently concluded for in the Sheriff's Small-Debt Court, no fees shall be allowed except those authorised by the Act 1st Vict. c. 41, unless the Sheriff see cause to the contrary ; but when a case is removed from the Small-Debt or Debts Recovery Court to the Ordinary Court, it shall be competent to the Sheriff to allow the business to be charged for according to the subjoined Tables.

3. (1) The scale for taxation shall in the ordinary case be determined by the amount concluded for, but in all cases it shall be competent to the Sheriff to direct that the expenses shall be taxed according to the scale applicable to the amount decerned for. (2) In cases where the sum concluded for

does not exceed £25, it shall be competent to the Sheriff to direct taxation on the higher scale, if he shall be of opinion that the amount sued for does not truly indicate the nature and importance of the cause. (3) In damages cases, the scale for taxation of the account between party and party shall for the pursuer's agent be regulated by the sum decerned for, unless the Sheriff shall otherwise direct. (4) It shall also be competent to the Sheriff to disallow all charges for papers or parts of papers or particular procedure or agency which he shall judge irregular or unnecessary.

These regulations shall not affect the ordinary power of the Sheriff to declare that expenses shall be subject to modification.

4. Procedure in ordinary removings and ejections shall be charged by the amount of the rent. When the rent is not set forth as exceeding £25, the charges shall be according to Scale 1. In actions *ad factum præstandum*, for exoneration, interdict, and others, where the pecuniary amount or value of the question in dispute cannot be ascertained from the process, the Sheriff, when deciding the case, shall determine according to which scale the account shall be taxed.

5. In causes of great importance, or requiring much special preparation, it shall be in the discretion of the Sheriff to allow for a debate on the merits a higher fee than those allowed in the Table, but not exceeding £5 ; and that either by a direction in the interlocutor disposing of the merits of the cause, or by a special interlocutor following on a motion by the party found entitled to expenses.

6. This table of fees shall regulate the taxation of accounts, as well between agent and client as between party and party, but with this distinction, that where, as between party and party, general charges of limited amount, such as "Taking Instructions" at the commencement of a case, "Instructions for Precognition," and "Process Fee," only are allowed, it shall be in the option of the agent, as against the client, to substitute for these general fees detailed charges for all necessary business in

connection with the case, the rates of charge being regulated by this Table.

7. The expenses to be charged against an opposite party shall be limited to proper "Expenses of Process," without any allowance (beyond that indicated in the Table) for preliminary investigations, subject to this proviso, that recognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced allowing a proof.

8. In order that the expenses of litigation may be kept within proper and reasonable limits, only such expenses shall be allowed, in taxing accounts between party and party, as are absolutely necessary for conducting it in a proper manner, with due regard to economy.

9. Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts of the proceedings.

10. Whenever a procurator on one side attends any meeting ordered by the Sheriff for adjusting the record, or

for any other purpose, and the other is absent, or not prepared to proceed, the Sheriff shall have power to decree against the opposite party for payment of the fee for attendance to the procurator who is ready. And when no notice has been sent of the withdrawal of an appeal, at least two lawful days before the date fixed by the Sheriff for an oral hearing, two-thirds of the fee for the debate will be allowed to the respondent's agent.

11. The principal interlocutor sheets shall not be given out to parties; a certified copy thereof shall be made up by the clerk from time to time, and put in process, for which he shall be allowed to make a charge at the end of the process for the total number of sheets contained therein, according to Art. 3 of the Table, to be paid by the party found liable in expenses, or where, no expenses are found due, by the parties equally.

12. When a remit shall be made by the Court, regarding matters in the record between the parties, to an accountant, engineer, or other reporter, the agents shall not, without special agreement, be personally responsible to the reporter for his remuneration,—the parties alone being liable.

13. Agents acting for parties on the peer's roll shall not be liable for the charges or allowances to witnesses, Sheriff-Clerks, shorthand writers, Sheriff-officers, or bar-officers.

JOHN INGLIS, *I.P.D.*

## TABLE OF FEES.

### I.—General Business in Sheriff Courts.

|   | SCALE I.<br>Not exceeding £25. | SCALE II.<br>Above £25. |
|---|--------------------------------|-------------------------|
| 1. Taking instructions to conduct case of pursuers, or defenders, including charge for entering or inquiring for appearance, interlocutor sheets, and inventory of process, and attending to all the necessary steps of form previous to enrolment, . . . . . | £0 5 0                         | £0 10 0                 |
| 2. Drawing papers per sheet (the sheet throughout this table consisting of 250 words)—  |                                |                         |

|  | SCALE I. | SCALE II. |
|--|----------|-----------|
| (1.) Petitions, condescendences, defences, and answers, commissions and diligences against witnesses or havers, memorials and precognitions, reclaiming petitions and answers, affidavits, and generally all necessary papers, £0 4 0  |          | £0 6 6    |
| Fair copies of commissions and diligences against witnesses or havers not allowed, and duplicates to be charged as copies.   |          |           |
| (2.) Inventories of productions, . . . . . 0 2 0   |          | 0 3 0     |
| Papers shall be confined, as closely as the case will permit, to statements of facts, and argument without quotations; but reference shall, where necessary, be made to the record and to authorities cited, as well as to proofs, deeds, writings, or correspondence produced, without the same being quoted at length; and if, in any paper produced in the cause, quotations of any kind exceeding one page each in length shall be made, the same shall be chargeable only at the rate of copying instead of drawing fees. |          |           |
| (3.) Figured states—   |          |           |
| Ordinary size, . . . . . 0 6 0   |          | 0 8 0     |
| Folio, . . . . . 0 8 0   |          | 0 10 0    |
| (4.) Revising papers—  |          |           |
| One-half the drawing fees.   |          |           |
| 3. Copying papers per sheet—   |          |           |
| (1.) If in English, . . . . . 0 1 0  |          | 0 1 6     |
| (2.) If in any other language, . . . . . 0 1 6   |          | 0 2 0     |
| (3.) Figured states—   |          |           |
| Ordinary, . . . . . 0 1 6  |          | 0 2 0     |
| Folio, . . . . . 0 3 0   |          | 0 4 0     |
| No allowance shall be made for a copy of any papers or productions in a process, except such as may be absolutely necessary. But each agent shall be entitled to a full copy of the record, interlocutors, and proof, and any productions that may be necessary for the efficient conduct of the cause.  |          |           |
| 4. Instructing counsel, where the employment of counsel is authorised, or subsequently sanctioned—   |          |           |
| Letter or attendance with fee—   |          |           |
| £1, 1s. or £2, 2s., . . . . . 0 6 8  |          | 0 6 8     |
| Exceeding £2, 2s., and not exceeding £5, 5s., ...  |          | 0 10 0    |
| Exceeding £5, 5s., . . . . . ...   |          | 0 13 4    |
| 5. Revising papers drawn by counsel, where the employment of counsel is authorised, or subsequently sanctioned—  |          |           |
| Not exceeding 5 sheets, . . . . . 0 2 6  |          | 0 3 4     |
| Exceeding 5 sheets, and not exceeding 10 sheets, . . . . . 0 5 0   |          | 0 6 8     |

|   | SCALE I. |    |   | SCALE II. |    |   |
|---|----------|----|---|-----------|----|---|
|   | £        | s  | d | £         | s  | d |
| And for every additional 10 sheets or part of 10 sheets, . . . . .  | 50       | 2  | 6 | 50        | 3  | 4 |
| The revisal of papers drawn by counsel to be charged according to their length as finally lodged.   |          |    |   |           |    |   |
| 6. Attendances, &c.   |          |    |   |           |    |   |
| (1.) Each necessary attendance, including journeys, attending at a debate when counsel instructed, or at a jury trial or proof, or an examination of parties or havers, or visitation or inspection ordered by the Court; or on an accountant, surveyor, engineer, architect, tradesman, or other person to whom a remit shall be made by the Court, or at an audit, or making searches of any of the public records, or other like attendances, where the same shall be necessary— |          |    |   |           |    |   |
| (a) If at the Court or in the town or place where the agent practises, or its neighbourhood, not exceeding half-an-hour, . . . . .  | 0        | 3  | 4 | 0         | 5  | 0 |
| Exceeding half-an-hour, but not exceeding an hour, . . . . .  | 0        | 5  | 0 | 0         | 6  | 8 |
| And for each half-hour thereafter, . . . . .  | 0        | 2  | 6 | 0         | 3  | 4 |
| (b) If at a distance therefrom, for the time occupied in such business (including travelling), at the rate per day of . . . . .   | 2        | 0  | 0 | 3         | 0  | 0 |
| Besides reasonable travelling charges, and an allowance for maintenance, at a rate not exceeding per day, . . . . .   | 1        | 0  | 0 | 1         | 0  | 0 |
| (c) If, during such absence, the time necessarily occupied in actual business during any day shall exceed eight hours, the agent shall have allowance for such additional time, at the rate for each hour of . . . . .  | 0        | 5  | 0 | 0         | 6  | 8 |
| (d) But when business may be properly performed by a local agent, the auditor shall only allow such expenses as would have been incurred if it had been done by the nearest local agent, including reasonable charges for instructing him.  |          |    |   |           |    |   |
| (2.) Allowance to agent for time of clerk necessarily occupied—   |          |    |   |           |    |   |
| (a) If in the town or place where the agent practises, or its neighbourhood, per hour, . . . . .  | 0        | 2  | 6 | 0         | 3  | 4 |
| (b) At a distance, per day, . . . . .   | 0        | 10 | 0 | 1         | 0  | 0 |
| And, in addition, reasonable travelling charges and personal expenses, the latter not exceeding per day, . . . . .  | 0        | 10 | 0 | 0         | 10 | 0 |
| (3.) Attendance lodging application, and procuring deliverance on any application where a special warrant other than a warrant of service is procured, <i>ex. gr.</i> interim interdict, sequestration, . . . . .   | 0        | 3  | 4 | 0         | 6  | 8 |

|  | SCALE I. | SCALE II. |
|--|----------|-----------|
| (4.) Borrowing a process consisting of not more than 40 numbers, . . . . .   | £0 1 0   | £0 1 6    |
| Above 40 and not exceeding 100 numbers, . . . . .  | 0 2 0    | 0 3 0     |
| Above 100, . . . . .   | 0 3 0    | 0 4 0     |
| But if only a part of the process is required, <i>ex. gr.</i> an interest in a process of multiplepointing, the charge to be according to the number of articles requiring to be borrowed.                             |          |           |
| (5.) Returning a process and getting receipt scored, one-half of the above borrowing fees.   |          |           |
| (6.) Ordering a caption for the return of a process, and intimating same to opposite agent, . . . . .  | 0 1 6    | 0 2 6     |
| (7.) If the process is not returned after intimation by the clerk, procuring caption, and instructing officer to execute, . . . . .  | 0 1 6    | 0 2 6     |
| When the caption is enforced, the above fees to be paid by the party against whom it is directed, with the clerk's and officer's fees, the several fees to be paid being printed or marked on the back of the caption. |          |           |
| (8.) Inquiries if paper of opposite party lodged, . . . . .  | 0 1 6    | 0 2 6     |
| But this to be charged only once as to each paper.   |          |           |
| (9.) Lodging each paper, and productions made therewith, . . . . .   | 0 1 6    | 0 2 6     |
| Or if productions necessarily lodged separately from paper, the same fee.  |          |           |
| (10.) Ordering and procuring from clerk, any deliverance, act or warrant, commission, diligence or extract decree, or authentication of an interlocutor or order of Court, where such is necessary, . . . . .          | 0 2 0    | 0 3 4     |
| (11.) Instructing messenger or officer to serve, execute, or intimate the various kinds of writs, when necessary—  |          |           |
| For the first party on whom service or intimation is made, . . . . .   | 0 2 0    | 0 3 4     |
| For every other, . . . . .   | 0 0 6    | 0 0 6     |
| This charge to include examination of executions.  |          |           |
| (12.) Attendance on reporter with proceedings, &c., and getting him to accept remit, . . . . .   | 0 2 0    | 0 3 4     |
| (13.) Attendance on reporter, getting up his report, and settling his fee, . . . . .   | 0 2 0    | 0 3 4     |
| (14.) Attendance on a Commissioner, fixing diet of proof or examination of parties or havers, and intimating the same to the opposite agent or party, and writing certificate of intimation, . . . . .                 | 0 3 0    | 0 5 0     |
| (15.) Attendance on Commissioner under commission and diligence, and getting up his report, with productions, &c., and paying his fee, . . . . .   | 0 3 0    | 0 5 0     |
| (16.) Perusing and considering reports obtained under a remit, . . . . .   | 0 3 4    | 0 5 0     |

|  | SCALE I. |    |   | SCALE II.                      |    |   |
|--|----------|----|---|--------------------------------|----|---|
| (17.) Taking out bond of caution, getting it signed, returning the same when executed to the clerk, and intimating the lodgment to the opposite agent, . . . . .   | £0       | 3  | 4 | £0                             | 6  | 8 |
| (18.) Procuring bond attested when necessary, . . . . .  | 0        | 2  | 0 | 0                              | 3  | 4 |
| (19.) Inspecting books to ascertain if caution has been found, and consenting or objecting thereto, . . . . .  | 0        | 3  | 4 | 0                              | 6  | 8 |
| (20.) Enrolling a cause and intimating enrolment to opposite agents—   |          |    |   |                                |    |   |
| Where only one agent, . . . . .  | 0        | 1  | 0 | 0                              | 2  | 6 |
| For each other, . . . . .  | 0        | 0  | 6 | 0                              | 0  | 6 |
| (21.) Attendance at calling in motion or compare-<br>ance roll, or at diets for adjustment, or when<br>the case is ordered to the roll for any purpose<br>other than a debate, . . . . .   | 0        | 3  | 4 | 0                              | 5  | 0 |
| But there shall be no charge for attendance<br>when the cause is not called, or where the<br>calling proves abortive.  |          |    |   |                                |    |   |
| (22.) Attendance and inquiries as to a cause at<br>avizandum, . . . . .  | 0        | 2  | 0 | 0                              | 3  | 4 |
| This to be only once stated for each time at avizandum.  |          |    |   |                                |    |   |
| (23.) Taking protestation for not calling, enrolling,<br>or insisting in the action, . . . . .   | 0        | 2  | 0 | 0                              | 3  | 4 |
| (24.) The papers which form the record being lodged<br>on both sides,—For the agent's trouble in<br>going through the whole proceedings and pro-<br>ductions, preparatory to, and attendance at<br>closing the record, . . . . .   | 0        | 6  | 8 | 0                              | 13 | 4 |
| (25.) Debate fee,—when a debate has been ordered by<br>the Sheriff, or the case appears in the debate<br>roll in ordinary course, or at the conclusion<br>of a proof, including preparation for debate, }<br>No other charge shall be made for attendances<br>in respect of case being in the debate roll,<br>however long the debate may have continued,<br>or however often the case may have been<br>called for such debate, or been in the roll<br>without being called. | 1        | 0  | 0 | From<br>1 10 0<br>to<br>3 0 0  |    |   |
| (26.) Attendance inquiring for or obtaining decree in<br>absence, . . . . .  | 0        | 3  | 4 | 0                              | 5  | 0 |
| (27.) Procuring an account of expenses marked by<br>the clerk, lodging the same with the auditor,<br>getting diet fixed, and intimating the same,<br>with copy of the account, to opposite agent, . . . . .  | 0        | 3  | 4 | 0                              | 5  | 0 |
| (28.) Framing account of expenses, per sheet, . . . . .  | 0        | 1  | 6 | 0                              | 2  | 0 |
| (29.) Ordering, procuring, and examining extract, . . . . .  | 0        | 3  | 4 | 0                              | 6  | 8 |
| (30.) At the end of each process, there shall be<br>allowed to the agents a fee, to be called<br>"Process Fee," to cover all general consulta-<br>tions during the progress of the case, and<br>communications written or verbal between the<br>agent and client, . . . . .  | 0        | 10 | 0 | From<br>0 10 0<br>to<br>1 10 0 |    |   |



|  | SCALE I. | SCALE II. |
|--|----------|-----------|
| 7. Correspondence—   |          |           |
| (1.) Each letter not exceeding one sheet, . . . . .  | £0 2 0   | £0 3 4    |
| And for each page or part of a page beyond the first sheet, . . . . .  | 0 1 0    | 0 1 8     |
| But mere formal letters (such as simply transmitting or annexing copies of papers) to be charged each . . . . .  | 0 1 0    | 0 1 6     |
| (2.) Telegrams (including attendance transmitting), . . . . .  | 0 2 0    | 0 3 4     |
| (3.) Circulars. Framing same, . . . . .  | 0 2 0    | 0 3 4     |
| Each copy, . . . . .   | 0 1 0    | 0 1 0     |
| To be printed if found to be less expensive than copying.  |          |           |
| Addressing and despatching printed circulars, not exceeding 20 in number, . . . . .  | 0 2 0    | 0 2 0     |
| If more in number, at same rate.   |          |           |
| (4.) Ordering advertisements—  |          |           |
| Each paper, including settlement of newspaper accounts, . . . . .  | 0 2 0    | 0 3 4     |
| 8. Mercantile sequestrations—  |          |           |
| (To be charged entirely under Scale II.)   |          |           |
| (1.) Receiving instructions and explanations to apply for sequestration, and writing mandate, . . . . .  | ...      | 0 10 0    |
| (2.) Attendance obtaining deliverance on the application, . . . . .  | ...      | 0 6 8     |
| (3.) Drawing abbreviate of sequestration, and getting same entered in register of inhibitions, . . . . .   | ...      | 0 6 8     |
| (4.) Inserting advertisement in each Gazette, whether Edinburgh or London Gazette, besides the usual fees of drawing the advertisement, according to length, . . . . .   | ...      | 0 3 4     |
| (5.) Obtaining deliverance, declaring election of trustee and commissioners, . . . . .   | ...      | 0 6 8     |
| (6.) Taking out bond of caution, getting it signed, and lodging, . . . . .   | ...      | 0 10 0    |
| (7.) Taking out act and warrant, and transmitting same to accountant in bankruptcy, . . . . .  | ...      | 0 6 8     |
| (8.) Drawing abbreviate of trustee's confirmation, and copying and recording the same, . . . . .   | ...      | 0 6 8     |
| (9.) Framing note when first dividend payable, and list of commissioners, and lodging same, . . . . .  | ...      | 0 10 0    |
| NOTE.—The other charges in sequestrations to be the same as charges for similar or analogous business under this Table.  |          |           |
| 9. Precognitions and proofs—   |          |           |
| (1.) No charge shall be allowed for precognitions of witnesses not examined, in the absence of a good and valid reason for such non-examination, and at the audit all precognitions charged shall be produced. |          |           |
| (2.) No charge shall be allowed for journeys, attendances or correspondence in connection with the precognition of witnesses, but in lieu thereof,   |          |           |

|  | SCALE I.                | SCALE II. |
|--|-------------------------|-----------|
| and in addition to the ordinary drawing fees of precognition, so far as relevant and necessary for the case, a charge shall be allowed, to be called "Instructions for Precognition,"  | £0 6 8                  | £0 13 4   |
| And in addition, reasonable travelling and personal expenses.  |                         |           |
| (3.) Perusing record, productions, precognitions, &c., before proof or trial, and preparing for same,  | 0 6 8                   | 0 13 4    |
| 10. Plans—   |                         |           |
| No allowance shall be made for plans lodged in process, except such as are either ordered, or subsequently sanctioned, by the Court, or prepared by mutual arrangement of parties, or proved and put in at the proof.  |                         |           |
| 11. Allowances to witnesses—   |                         |           |
| The charges for witnesses attending proofs or a trial shall not exceed the following rates :—  |                         |           |
| (1.) <i>Where the witnesses reside in the town, or within four miles of the Court-house where the proof or trial takes place :—</i>  |                         |           |
| Labourers, mechanics, servants, journeymen, &c., per day, according to circumstances,  | From 0 5 0<br>to 0 7 6  |           |
| Tradesmen, shopkeepers, innkeepers, clerks, farmers, manufacturers, auctioneers, &c., per day, according to circumstances,   | From 0 10 0<br>to 1 1 0 |           |
| Gentlemen, merchants, bankers, clergymen, &c., per day,  |                         | 1 1 0     |
| Professional persons, such as writers or solicitors, accountants, physicians, surgeons, eminent architects, civil engineers, surveyors, &c., per day,  |                         | 2 2 0     |
| Women, according to their station in life, per day,  | From 0 5 0<br>to 1 0 0  |           |
| The above allowances being in full of all the above respective classes of persons shall be entitled to demand for their trouble and maintenance, and no separate charges shall be allowed for hotel expenses or otherwise, in respect of witnesses. When less than a day is occupied, a corresponding reduction to be made in the allowance.   |                         |           |
| (2.) <i>Where the witnesses do not reside in the town, or within four miles of the Court-house where the proof or trial takes place :—</i>   |                         |           |
| They shall be allowed at the above rates for the time necessarily occupied by them in going to, remaining at, and returning from the place of proof or trial, besides reasonable travelling charges going to and returning from the place of proof or trial, according to their rank and station of life, and with reference to the means of conveyance to and from their respective |                         |           |

SCALE I. | SCALE II.

places of residence, such as steamboats, railways, &c. The said allowances for travelling shall not exceed in whole the rate of sixpence per mile for going to, and the same for returning from, the place of proof or trial; and in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants, to make investigations previous to a proof or trial, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the Sheriff shall, on a motion made to him either at the proof or trial, or within eight days thereafter if the Court is in session, or if in vacation, within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance.

Receipts or vouchers for all the sums stated as paid to witnesses shall be produced to the auditor at the taxation of the account, otherwise the same shall not be allowed.

The names of the witnesses examined at the proof or trial shall be stated separately from those not examined; and if the expenses of all or any of the latter class of witnesses shall be demanded, the grounds or reasons for such demand shall be stated, as, for example, that the witness was in attendance to prove a certain fact or writing which the opposite party had previously refused to admit, but which was admitted at the proof or trial, whereby the examination of the witness was rendered unnecessary; or (in the case of a defender) because the pursuer had failed to prove his case, in consequence of which the defender's witnesses were not examined, but in this latter case it ought to be shown that all the witnesses charged for were necessarily cited, or in attendance, the general rule being that the expense of witnesses not examined shall not be allowed unless a good and valid reason shall be assigned for their non-examination. In the absence of a note in terms of this direction, the witnesses not examined shall be disallowed by the auditor.

#### 12. Shorthand writers—

- (1.) Attendance at proofs and commissions, not exceeding per hour (besides reasonable travelling charges when necessary), . . . . .

£0 5 0 £0 5 0

|  | SCALE I. |    |   | SCALE II. |    |   |
|--|----------|----|---|-----------|----|---|
|  | £        | s  | d | £         | s  | d |
| (2.) Extending notes, per sheet, . . . . .   | £0       | 1  | 0 | £0        | 1  | 6 |
| 13. Appeals—   |          |    |   |           |    |   |
| (1.) Marking appeals to the Sheriff or the Court of Session, . . . . .   | 0        | 2  | 0 | 0         | 3  | 4 |
| (2.) To the respondent's agent for inquiring as to appeal lodged, . . . . .  | 0        | 2  | 0 | 0         | 3  | 4 |
| 14. Auditor's fees—  |          |    |   |           |    |   |
| (1.) Decrees in absence, . . . . .   | 0        | 2  | 6 | 0         | 2  | 6 |
| (2.) In litigated cases, and under diligence—  |          |    |   |           |    |   |
| When the account is under £10, . . . . .   | 0        | 2  | 6 | 0         | 2  | 6 |
| £10 and under 20, . . . . .  | 0        | 5  | 0 | 0         | 5  | 0 |
| 20       "       50, . . . . .   | 0        | 7  | 6 | 0         | 7  | 6 |
| 50       "       75, . . . . .   | 0        | 10 | 0 | 0         | 10 | 0 |
| 75       "       100, . . . . .  | 0        | 15 | 0 | 0         | 15 | 0 |
| 100       "       150, . . . . .   | 1        | 1  | 0 | 1         | 1  | 0 |
| 150 and upwards, . . . . .   | 1        | 11 | 6 | 1         | 11 | 6 |
| 15. Personal diligence—  |          |    |   |           |    |   |
| (1.) Recording execution of charge, . . . . .  | 0        | 2  | 0 | 0         | 3  | 4 |
| (2.) Procuring fiat, . . . . .   | 0        | 2  | 0 | 0         | 3  | 4 |
| (3.) Instructing apprehension, . . . . .   | 0        | 3  | 4 | 0         | 6  | 8 |
| (4.) State of debt and attendance at settlement, . . . . .   | 0        | 3  | 4 | 0         | 6  | 8 |
| 16. Sales—   |          |    |   |           |    |   |
| (1.) Fee on reporting sales under pointings or sequestrations, or any other judicial sales, including procuring approval of roup roll, . . . . .   | 0        | 2  | 6 | 0         | 3  | 4 |
| (2.) Fee on obtaining warrant to pay, . . . . .  | 0        | 2  | 0 | 0         | 3  | 4 |
| (3.) Fee for conducting sale, exclusive of the auctioneer's fee, when the amount of the roup roll is under £100, at the rate of £5 per cent.; for all above, £2, 10s. per cent.; besides personal expenses and other necessary outlay. |          |    |   |           |    |   |
| 17. Procurator fiscal—   |          |    |   |           |    |   |
| For his concurrence, . . . . .   | 0        | 2  | 6 | 0         | 3  | 4 |

## II.—For Execution Business.

(So far as not falling under the foregoing Table.)

1. Petition for decree-dative—
  - (1.) Presenting petition and directing publication, . . . . . £0 6 8
  - (2.) Attendance in Court, moving for and obtaining decree-dative, . . . . . 0 6 8
2. For inventory of moveable estate—
  - (1.) Fee obtaining the necessary information relative to the nature of the moveable estate, and all other particulars requisite for the preparation of the inventory, . . . . . 0 6 8

NOTE.—In place of this fee it shall be in the option of the agent to substitute detailed charges for all necessary business requisite for the preparation of the inventory, the rates of charge being regulated by this Table,

but in that case he will not be entitled to any *ad valorem* fee for procuring confirmation.

## SCALE II.

|   |        |
|---|--------|
| (2.) Drawing inventory and oath—per sheet, . . .  | £0 6 0 |
| Extending ditto—per sheet, . . .  | 0 1 6  |
| (3.) Attendance with the executor, before the Sheriff or Justice of Peace, when oath taken, . . .   | 0 6 8  |
| (4.) Agency taking out bond of caution, getting it subscribed, and lodging it with the Clerk, . . . | 0 6 8  |
| (5.) Agency procuring attestation of cautioner's sufficiency, . . .                                 | 0 3 4  |
| 3. Where it is necessary to obtain restriction of caution—  |        |
| (1.) Fee on interlocutor ordering advertisement, . . .  | 0 6 8  |
| (2.) Fee on interlocutor restricting or refusing to restrict caution, . . .                         | 0 6 8  |
| 4. For procuring confirmation—  |        |
| Where the value of the estate does not exceed—  |        |
| £100, . . .   | 0 5 0  |
| 250, . . .  | 0 10 0 |
| 500, . . .  | 0 15 0 |
| 1000, . . .   | 1 1 0  |
| 2000, . . .   | 1 11 6 |
| 5000, . . .   | 3 3 0  |
| Upwards of £5000, . . .   | 5 5 0  |

III.—*Trials under § 23 of the Act 16 & 17 Vict. cap. 80, and under § 52 of the Act 39 & 40 Vict. cap. 70.*

|   | SCALE I. | SCALE II.                      |
|---|----------|--------------------------------|
| 1. Charges for taking instructions, attendances, and precognitions, to be the same as under this Table in ordinary cases.                               |          |                                |
| 2. A debate fee to be allowed for the diet at which the proof is led and the parties heard and judgment given, not by length, but a single fee of . . . | £1 0 0   | From<br>£1 10 0<br>to<br>3 0 0 |
| This fee only to be charged once in course of any case tried under these sections.  |          |                                |

IV.—*Causes under 1 Vict. cap. 41, § 4.*

Where a cause is remitted to the Small Debt Court roll, under § 4 of the Small Debt Act, there shall be allowed in respect of the trial of the cause, to cover every trouble, a fee of

£1 0 0

JOHN INGLIS, I.P.D.

## CHAPTER II.—FEES OF SHERIFF-OFFICERS.

ACT OF SEDERUNT regulating the Fees of Procurators and Practitioners in the Sheriff and Stewart Courts of Scotland.—Edinburgh, 6th March, 1833; renewed, 2nd June, 1837.

TABLE OF FEES IN CIVIL BUSINESS FOR SHERIFF-OFFICERS  
IN SCOTLAND.*Citations.*

For executing a summons, or charging on a decree or registered protest, or using arrestment, or serving a petition or complaint, minute, interlocutor, or warrant, or intimation, or citing for examination,—for each of these several acts, and returning execution, the following fees will be allowed for officer and witnesses :—

When the demand does not exceed the sum which may be competently pursued for in the Sheriff's Small Debt Court, . £0 1 6

Above the sum which may be competently pursued for in the Sheriff's Small Debt Court, and not exceeding £50, . 0 2 0

Above £50, . 0 2 6

For executing against more than one person on the same warrant, when a separate execution not necessary, each copy after the first—officer and witnesses, . 0 1 0

For travelling each mile after the first, from the Court-house, or the residence of the officer employed in the execution of any of the above duties ;—the distance travelled in returning after execution of the duty not to be reckoned—officer and witnesses, . 0 1 2

For citing a witness within a mile of the Court-house, or residence of the officer employed—officer and witnesses, when the demand does not exceed the sum which may be competently pursued for in the Sheriff's Small Debt Court, . 0 1 0

Above the sum which may be competently pursued for in the Sheriff's Small Debt Court, . 0 1 6

For every other witness cited within the same distance, when a separate execution is not necessary—officer and witnesses, . 0 1 0

For travelling each mile after the first, either from the Court-house or officer's place of residence, when citing witnesses—officer and witnesses, . 0 1 0

The above fees to include short copies of citation, and returning executions.

For attending the proof or examination of parties when required, for each hour, . 0 1 0

*Briefes.*

|   |    |   |   |
|---|----|---|---|
| For publishing a briefe of service—officer and witnesses, | £0 | 2 | 6 |
| Attending at the service, first hour,                     | 0  | 2 | 0 |
| For every other hour,                                     | 0  | 1 | 0 |

*Poidings.*

When the appraised value does not exceed the sum which may be competently pursued for in the Sheriff Small Debt Court, and the fees are not limited by the Statute 10 Geo. IV. cap. 55, or by any other statute—

|  |   |    |   |
|--|---|----|---|
| To the officer for collecting his party, framing schedule, filling up the same, and completing the poiding in legal form—for himself and party,  | 0 | 6  | 0 |
| Extending the execution of poiding, per sheet,   | 0 | 1  | 0 |
| Making catalogue of poided effects, and granting certificate for the excise,   | 0 | 1  | 0 |
| When the appraised value is above the sum which may be competently pursued for in the Sheriff Small Debt Court, and does not exceed £12—officer and party,   | 0 | 7  | 6 |
| Extending execution, per sheet,  | 0 | 1  | 0 |
| Making catalogue, per sheet, and granting certificate for the excise,  | 0 | 1  | 0 |
| When the appraised value is above £12, and does not exceed £25—officer and party,  | 0 | 12 | 6 |
| Extending execution, per sheet,  | 0 | 1  | 0 |
| Making catalogue per sheet, and granting certificate for the excise,   | 0 | 1  | 6 |
| When the appraised value exceeds £25, and does not exceed £50—officer and party,   | 0 | 15 | 0 |
| Extending execution, per sheet,  | 0 | 1  | 0 |
| Making catalogue, per sheet, and granting certificate for the excise,  | 0 | 1  | 6 |
| When the appraised value exceeds £50—officer and party,  | 1 | 0  | 0 |
| Extending execution, per sheet,  | 0 | 1  | 0 |
| Making catalogue, per sheet, and granting certificate for the excise,  | 0 | 1  | 6 |
| If the officer and party is necessarily employed more than two hours in executing poidings, or in travelling for that purpose, to be allowed, in addition to the above rates, for each hour after the first two—officer and party, | 0 | 2  | 6 |
| But under this last charge, the officer, for himself and party, not to have in one day more than   | 0 | 15 | 0 |
| Although the appraised value should exceed the amount of the debt, the latter is to be the rule of the officer's charge; and these charges are to be in full of all incidents, and all other expenses excepting stamps.            |   |    |   |

*Sequestrations.*

Taking inventory of sequestrated effects—

|   |    |    |   |
|---|----|----|---|
| When the rent to be secured does not exceed £12—officer and witnesses, . . . . .  | £0 | 5  | 0 |
| When the rent is above £12, and does not exceed £25—officer and witnesses, . . . . .  | 0  | 7  | 6 |
| When the rent is above £25, and does not exceed £50—officer and witnesses, . . . . .  | 0  | 10 | 0 |
| When the rent is above £50—officer and witnesses, . . . . .   | 0  | 12 | 6 |
| Writing out inventory and schedule, per sheet of each, in any of the above cases, . . . . .   | 0  | 1  | 0 |
| If the officer and witnesses are necessarily employed more than two hours in taking the inventory, or travelling for that purpose, to be allowed, in addition to the above fees, for each hour after the first two—officer and witnesses, . . . . . | 0  | 1  | 6 |
| But under this last charge, for the hours after the first two, the officer not to have in one day, for himself and witnesses, more than . . . . .   | 0  | 10 | 0 |
| For serving petition of sequestration when the inventory of sequestrated effects is taken by the officer—officer and witnesses, . . . . .   | 0  | 1  | 6 |

*Ejections.*

The same fees to be allowed as in sequestrations.

*Sales.*

In cases of sale of poulded or sequestrated effects, an officer conducting such sale, by executing the warrant and collecting the proceeds, will be held liable for the amount of the roup-roll, and will be allowed for his trouble and risk, including auctioneer's fees, as follows :—

When the amount of the roup-roll is the sum which may be competently pursued for in the Sheriff Small Debt Court, or under, he will be allowed 7s. 6d.

When the amount of the roup-roll is above the sum which may be competently pursued for in the Sheriff Small Debt Court, and does not exceed £100, he will be allowed at the rate of 5 per cent.

When the amount of the roup-roll exceeds £100, but does not exceed £1000, he will be allowed the above rate for the first £100, and for every additional £100, or part of £100, 3 per cent. ; and when the amount exceeds £1000, he will be allowed the above rates for the first £1000, and 2 per cent. for every additional £100, or part of £100.

The above poundage to cover all charges for trouble in relation to the sale, and for collecting the proceeds, including drawing advertisements and



articles of roup ; but the officer will be allowed all his necessary disbursements or expenses, such as advertising, paying crier, travelling charges, &c.

He will also, when the proceeds are above £20, be allowed, for an assistant clerk, 7s. 6d.

*Warrants and Examinations.*

Executing warrants to apprehend, and bringing for examination—

|  |    |    |   |
|--|----|----|---|
| officer and one assistant, for the first hour, . . . . .                 | £0 | 5  | 0 |
| Every other hour, . . . . .  | 0  | 1  | 6 |
| If more than one assistant be required, the officer shall be             |    |    |   |
| allowed for each additional assistant, for the first hour, . . . . .     | 0  | 1  | 6 |
| Every other hour, . . . . .  | 0  | 0  | 6 |
| But a charge for a day of 24 hours not to exceed, for officer, . . . . . | 0  | 15 | 0 |
| For each assistant, . . . . .  | 0  | 6  | 0 |
| For executing a caption for the return of a process, . . . . .           | 0  | 2  | 6 |

If the procurator who holds the process resides more than a mile distant from the clerk's office, the officer and his assistant to be paid at the same rate as when executing warrants to apprehend.

*Bar Fees.*

|  |    |   |   |
|--|----|---|---|
| To the bar-officer, at calling each new cause, . . . . . | £0 | 0 | 2 |
| For each enrolment, . . . . .                            | 0  | 0 | 1 |

*Fees Payable in Exchequer.*

To the schoolmaster, Sheriff-officer, constable or other person employed in taking up lists of jurors, under the Statute 6 Geo. IV. c. 22, for each day of ten hours he is actually employed on this duty, . . . . . £0 7 2

Officers employed in summoning the jury and witnesses for the annual fairs ; for serving precepts respecting the election of a Member of Parliament ; precepts on account of the Crown ; proclamations for general fasts or thankgivings, or other the like business, to be allowed for the first mile, 1s., and every mile after the first, 4d., but not exceeding 7s. 6d. for each day, or twenty miles travelled. These allowances to be in full of all travelling expenses, except ferries ; but when the officer has to cross ferries he will be allowed the necessary freight of the ferry, and to charge the breadth of the ferry and one-half more.

*Jury Court Proceedings.*

Summoning jurors to the Jury Court, or countermanding their attendance, or rewarning them to attend—

|  |    |   |   |
|--|----|---|---|
| For each copy citation, . . . . .                                | £0 | 0 | 6 |
| For each jurymen countermanded or rewarned, . . . . .            | 0  | 0 | 4 |
| These allowances to be in full for summoning, countermanding, or |    |   |   |

renewing all juryment residing within a mile of the residence of the officer employed.

Travelling every mile after the first, in the execution of these duties, at the rate of 7s. 6d. for each day, or twenty miles travelled.

If the same jury be summoned to the same day for the trial of different cases, the allowance for travelling to be apportioned equally amongst the different cases.

These allowances to be in full of all travelling expenses, except ferries; and also to be the rule of payment for officers in summoning juries and witnesses in cases for assessing damages, or valuing property, or other the like business.

To the officer for attending in Court to verify execution, if resident where the trial takes place, . . . . .

£0 6 6

If he comes from a distance, for each day of twenty-four hours he is occupied, including coming and returning, . . . . .

0 7 0

Besides his actual expenses.

*Note 1st.* When the officer has to cross ferries, he will be allowed the necessary freight of the ferry, and to charge the breadth of the ferry and one-half more.

*Note 2nd.* No charge to be made by an officer for anything done in causes on the poor's roll, except for actual outlay, unless expenses shall be recovered from the opposite party.

*Note 3rd.* The sheet of writings to be computed at 300 words, when not otherwise specified; but if the writing does not contain 300 words, to be charged as one sheet; and if, after finding the number of sheets which any such writing shall comprise, calculated at the rate aforesaid, any number of words less than 300 words shall remain, such fewer words shall be charged as a sheet.

C. HORN, I.P.D.

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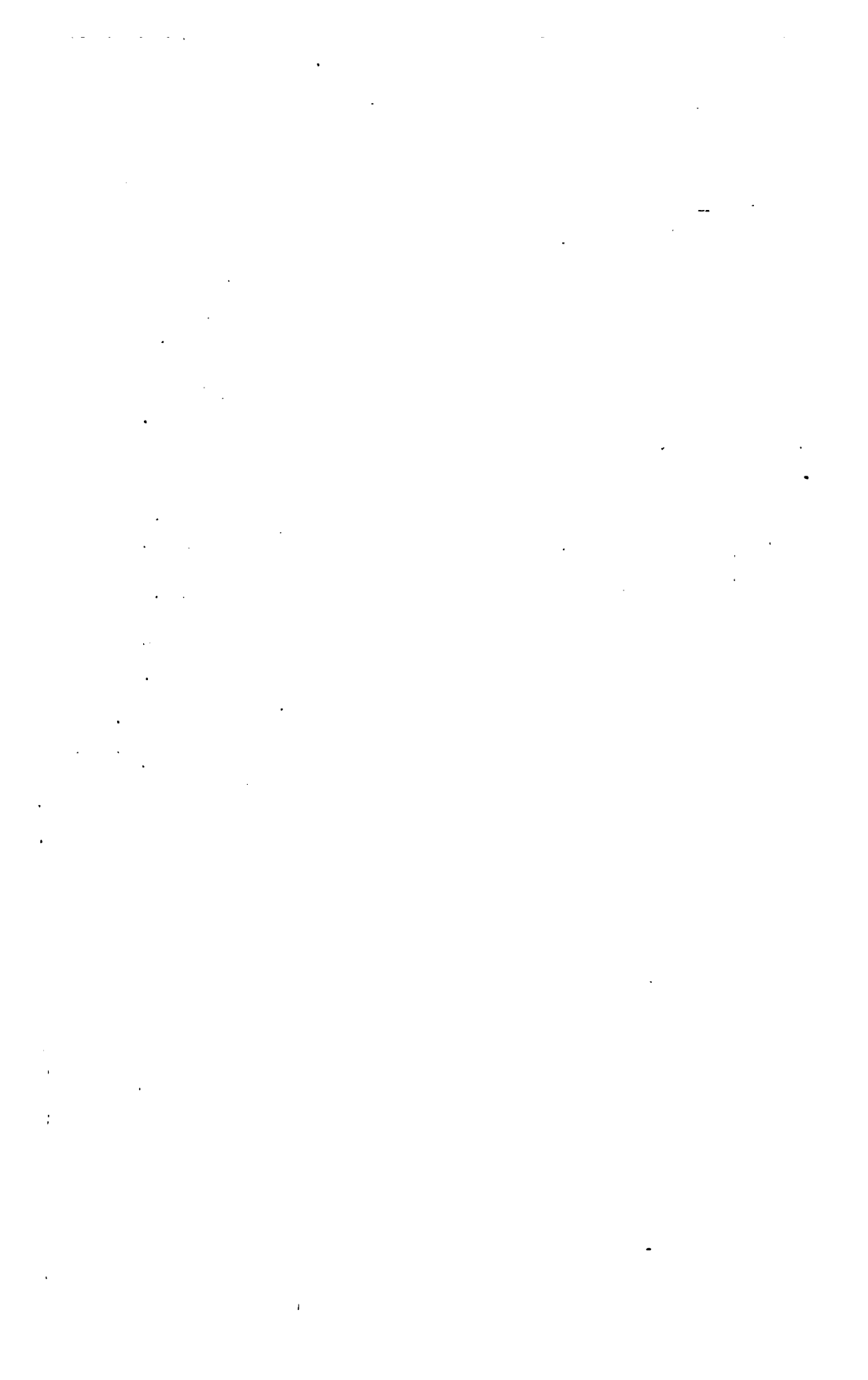
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